Supreme Court, U.S.
FILED

MAR 19 2003

No. 02-1415

In The
Supreme Court of the United States

GRAND AERIE, FRATERNAL ORDER OF EAGLES,

Petitioner,

v.

TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES; KATHLEEN J. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; ALICE F. VASSAR; and WHIDBEY ISLAND AERIE NO. 3418, FRATERNAL ORDER OF EAGLES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment prohibit a State, through its public accommodations statute, from forcing private, quasi-religious, social fraternities like the Fraternal Order of the Eagles to accept members whom they do not wish to accept?

PARTIES TO THE PROCEEDING

Petitioner Grand Aerie, Fraternal Order of Eagles ("Grand Aerie") was defendant at the trial court level, appellant before the Washington Court of Appeals, and respondent before the Washington Supreme Court. The Grand Aerie is the national rulemaking body of the Fraternal Order of Eagles, a private, quasi-religious, social fraternity. As required by Supreme Court Rule 29.6, the Grand Aerie states that it is a non-profit organization and has no ownership by any individual or public or private corporation.

Respondents Tenino Aerie No. 564, Fraternal Order of Eagles, and Whidbey Island Aerie No. 3418, Fraternal Order of Eagles are local aeries of the Fraternal Order of Eagles in the State of Washington. Respondents Kathleen J. Conner, Lanette Davis, Julia A. Foster, Gayle L. Hartman, Kaycee L. Johnson, Annette Riley, Dianne E. Roberts, Janet Tresentriter, and Alice F. Vassar are women who were denied membership in a Fraternal Order of Eagles aerie because, while facilities are open to male and female members, the Eagles' "familial brotherhood" organizational system limits aerie membership to men and auxiliary membership to women.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Washington.

OPINIONS BELOW

The oral ruling and summary judgment of the Thurston County, Washington Superior Court are included in the appendix. App. 78-101. The Washington Court of Appeals opinion (App. 66-77) is reported at 108 Wash. App. 208, 27 P.3d 1254 (2001). The Washington Supreme Court opinion (App. 1-65) is reported at 148 Wash. 2d 224, 59 P.3d 655 (2002).

STATEMENT OF JURISDICTION

The decision of the Washington Supreme Court issued on December 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Because this case involves the constitutionality of the Washington Law against Discrimination, Wash. Rev. Code 49.60, as applied to the Fraternal Order of Eagles, 28 U.S.C. § 2403(b) may apply. A copy of this Petition for Certiorari is therefore being served on the Attorney General of the State of Washington.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Washington Law Against Discrimination ("WLAD") grants citizens of the state "the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." Wash. Rev. Code 49.60.030(1)(b). The statute contains the following definition:

> "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for

consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

Wash. Rev. Code 49.60.040(10).

STATEMENT OF THE CASE

I. Factual Background[1]

The Fraternal Order of Eagles is an international quasi-religious social fraternity with over 1.6 million members and local aeries in all fifty states, Mexico, Canada, and numerous other countries throughout the world. App. 2. The Order was founded in 1898 to "unite fraternally for the mutual benefit, protection, improvement and social enjoyment" of its members. *Id.*[2] From the outset, the Fraternal Order of Eagles has been a fraternal brotherhood, limiting aerie membership to men. Declaration of Robert Wahls ("Wahls Declaration") at ¶ 4. App. 114. The sole purposes of the organization are social and charitable. *Id.*

The Articles of Incorporation describe the purposes of the organization as follows:

> The objects for which the Fraternal Order of Eagles is formed and shall exist are:
>
> To unite fraternally for the mutual benefit, protection, improvement and social enjoyment, all persons as it, by its Constitution, Laws, Rituals, By-Laws, and other forms or rules and regulations, may from time to time provide, and to make its members and Subordinate bodies or units subject thereto;

---

[1] Because this case was resolved by summary judgment against the Grand Aerie, all facts must be construed in a light most favorable to the Grand Aerie's position.

[2] Relevant portions of the Articles of Incorporation, Constitution and Statutes of the Grand Aerie, Fraternal Order of Eagles (1997 Edition) are set forth in the appendix. App. 156-180.

* * *

> To do any and all things necessary and incident to the development, progress, growth and welfare of the Grand Aerie, or any of its Subordinate units or bodies, or members thereof, and to do and perform any and all other things as may be generally performed by a fraternal beneficiary society.

Articles of Incorporation. App. 157-58.

The Articles of Incorporation establish the Official Symbols of the Fraternal Order of Eagles, including the official emblem, the official flags, the official standard, the official colors, the official insignia and the official seal. Articles of Incorporation, "Official Symbols." App. 159. The Eagles have also established official rituals and ceremonies known only to the members. Widell Affidavit, ¶ 5. App. 155.

The Grand Aerie of the Fraternal Order of Eagles ("Grand Aerie") is the governing body of the organization. F.O.E. Constitution, Article I, Section 2. App. 160. The Grand Aerie promulgates rules and coordinates the Local Aeries of the Fraternal Order of Eagles. The Grand Aerie is divided into three departments: executive, legislative and judicial. F.O.E. Constitution, Article II. App. 160. The Executive Department is made up of the Grand Worthy President and the Board of Grand Trustees. F.O.E. Constitution, Article IV. App. 165. The legislative power is vested in a Grand Aerie made up of "present and future Past Worthy Presidents." F.O.E. Constitution, Article III, Section 1. App. 161-62. Judicial power is vested in the Grand Tribunal. App. 168.

The officers of the Grand Aerie include: The Junior Past Grand Worthy President, The Grand Worthy President, The Grand Worthy President-Elect, The Grand Worthy Vice-President, The Grand Worthy Chaplain, The Grand Secretary, The Grand Treasurer, The Grand Worthy Conductor, The Grand Inside Guard, The Grand Outside Guard, The Grand Trustees, and The Grand Justices. Constitution, Article VI, Section 1. App. 170-71.

Unlike groups such as the Jaycees and Rotary, the Fraternal Order of Eagles is not a civic or business group. The Fraternal Order of Eagles does not promote the business or economic interests of its members. Declaration of Robert Wahls at ¶ 4. App. 114. Conducting outside business at aerie meetings is strictly forbidden. *Id.* at ¶ 5. App. 114-15. The ritual does not provide any opportunity for members to promote their business, sell products, network, or otherwise engage in economic activity. *Id.* It would be wholly inappropriate to do so. The Fraternal Order of Eagles does not offer classes, training or other opportunities for members to develop business skills or contacts. *Id.* Plaintiffs offered no evidence that the Fraternal Order of Eagles conducts any activities to enhance the ability of its members to make money. The trial court recognized "there are distinctions . . . between a club such as Rotary based upon business associations and the promotion thereof and other types of clubs." App. 98. The Washington Supreme Court also acknowledged the factual claim "that the Eagles' policy forbids its members from promoting business interests or engaging in economic activities while participating in an Eagles' activity." App. 31.

Because it is a social brotherhood, the Fraternal Order of Eagles is selective in its membership practices. App. 36. The Order does not advertise for members, nor do

Eagles solicit membership at public functions. *Id.* To become a member of a Fraternal Order of Eagles aerie, an individual must be proposed for membership by two current members in good standing of the aerie. App. 36.

Members may not propose an individual for membership unless they believe that the individual would be a good friend and fraternal brother. Wahls Declaration at ¶ 9. App. 116.

The Fraternal Order of Eagles is viewed by its members as a "familial brotherhood." *Id.* The relationships among members of a Fraternal Order of Eagles aerie are similar to the relationships among brothers. *Id.* No Eagle would propose another person as a member unless he would feel comfortable welcoming that person into his home. *Id.* The requirement of sponsorship by current members enables the Eagles to be selective about membership and is the reason relatively few applicants are rejected. *Id.*

In addition to personal sponsorship, there are minimum qualifications that must be met by each prospective member. No person may be proposed for membership in an aerie of the Fraternal Order of Eagles unless:

> such person is a male, is of good moral character, believes in the existence of a Supreme Being, . . . and unless he is over twenty-one (21) years of age. . . . Nor shall any person, under any circumstances, be eligible to be elected to membership in any Local Aerie if he is a member or in any way connected or affiliated with the Communist Party, or who believes in or advocates the overthrow of the Governments of the United States, Canada, the Philippines, the Republic of Mexico, or the United Kingdom by force or violence.

Widell Affidavit, Exhibit A, Statutes, Title III, Section 70.2. App. 172-73.

Each prospective member must be interviewed and recommended by a Local Aerie Interviewing Committee. Wahls Declaration at ¶ 8. App. 115-16. The purpose of the interview is social and fraternal. *Id.* The applicant gets a sense of the personalities of current members. The committee gets a sense of the applicant's personality. *Id.* The committee decides whether to recommend the applicant for membership. The criterion upon which the committee makes its decision is whether the applicant would be a good friend and fraternal brother to the current members of the aerie. *Id.* Once recommended by the Aerie Interviewing Committee, the applicant must receive a majority vote in a secret ballot of the members at an aerie meeting. *Id.* As with the interviewing committee, the vote is based on whether the individual would be a good fraternal brother. *Id.*

Local aerie facilities are not open to the public. Wahls Declaration at ¶ 10. App. 116. Like many fraternal organizations, churches, schools, and other non-profit organizations with facilities that are not always in use, some Eagles aeries rent rooms in their physical facilities for weddings and similar special events. *Id.* But members of the public have never been permitted to attend aerie or auxiliary meetings or social gatherings. Only members in good standing of a Fraternal Order of Eagles aerie or auxiliary may enter and use the facilities. *Id.*

Aerie membership meetings and initiation ceremonies are performed in strict accordance with a memorized ritual and may be attended only by the male members of an aerie. *Id.* at ¶ 11. App. 116-17. The memorized rituals

are known only to aerie members. *Id.* The rituals express the members' shared belief in "manly virtues" and the intrinsic value of "brotherhood." *Id.* The Eagles believe, and express in their rituals, that there is a unique and valuable bond of brotherhood among a group of men who make each other the simple promise of continued friendship. The rituals also include prayers and other references to members' shared belief in God. *Id.* The rituals are significant and meaningful to members of the Order. *Id.* Aeries practice their rituals extensively. *Id.* Ritual competitions are an integral part of state, regional, and national Eagles' gatherings. *Id.* The rituals would lose their meaning if they were not performed among male "brothers" who value the unique bond among a group of male friends and share a belief in a Supreme Being. *Id.*

Members of the Fraternal Order of Eagles overwhelmingly support the continuation of the Order, including its ritual practices. *Id.* at ¶ 12. App. 117. At the 1998 meeting of the Grand Aerie, the Grand Aerie Delegates (all Worthy Presidents and Past Worthy Presidents of all local aeries, nationally and internationally) voted nearly unanimously to maintain the organization's rule that only males may be admitted to Eagles aeries. *Id.*

All Eagles aeries are non-profit fraternal organizations. *Id.* at ¶ 13. App. 117. Aeries are supported strictly by private funds. *Id.* Local aeries obtain liquor licenses as private clubs or fraternal organizations. *Id.* at ¶ 15. The federal Internal Revenue Service recognizes the Grand Aerie as a fraternal organization. *Id.* The Fraternal Order of Eagles has been determined by every governmental agency that has evaluated the issue to be a fraternal organization. *Id.*

II. Procedural History And Presentation Of Federal Question

A. Thurston County Superior Court

On July 20, 1999, plaintiffs filed in Thurston County Superior Court their Amended Complaint for Injunctive Relief, Declaratory Relief, and Damages against the Grand Aerie and the Washington State Aerie of the Fraternal Order of Eagles. App. 188-96. In its Answer and Defenses, the Grand Aerie set forth its claim that application of the statute to the Fraternal Order of Eagles would violate the right of the Grand Aerie to freedom of association under the First Amendment. App. 186. The parties filed cross-motions for summary judgment. In its Memorandum in Opposition to Summary Judgment, the Grand Aerie raised and extensively briefed its First Amendment claim. App. 102-12.

On March 27, 2000, the trial court entered its order on the cross-motions. App. 78-80. The order granted plaintiffs' motion for summary judgment on their claims under the public accommodations provisions of the WLAD, rejecting the Grand Aerie's First Amendment claim. The order dismissed all of plaintiffs' remaining claims.

B. Washington Court Of Appeals, Division II

The Grand Aerie appealed and again extensively briefed the First Amendment claim. The Washington Court of Appeals reversed the trial court's decision based on its holding that the Washington Law Against Discrimination exempts fraternal organizations such as the Eagles. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie, Fraternal Order of Eagles*, 108 Wash. App. 208, 217-18, 27 P.3d 1254, 1259 (2001). The court of appeals

acknowledged, but decided it was unnecessary to address, the Grand Aerie's constitutional arguments:

> Because we have decided this case based upon the statute, we do not address the parties' constitutional arguments.

App. 77.

C. Washington Supreme Court

Plaintiffs filed a petition for review in the Washington Supreme Court. The Washington Supreme Court accepted review. Again, the Grand Aerie raised and thoroughly briefed its First Amendment claim. *See* Supplemental Brief of Grand Aerie. App. 197-203. The Washington Supreme Court reversed the decision of the Washington Court of Appeals. This marks the first occasion that the Fraternal Order of Eagles has been required by a court to admit women to aerie membership.

In considering the First Amendment issue, the majority appears to have construed this Court's decisions in *Roberts v. U.S. Jaycees,* 468 U.S. 609, 626 (1984) and *Board of Dirs. of Rotary Intern. v. Rotary Club,* 481 U.S. 537 (1987) as merging intimate association with expressive association. The Washington Supreme Court decision suggests that if an organization is not "private" under a state public accommodations law, then the organization also does not engage in expressive conduct for First Amendment Purposes. App. 30-31.

The majority holds that that although "[t]he record reveals facts suggesting the Eagles' membership practices are selective," the conclusions reached by the trial court on the summary judgment motion, including that "the Eagles

was not selective in its membership practices and thus was not distinctly private . . . were not in error." App. 36-37. The majority opinion does not explain how a lack of selectivity could defeat the Eagles' expressive (as opposed to intimate) association claim, nor does the opinion explain how its holding can be reconciled with this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

In a concurrence, Washington Supreme Court Justice Madsen acknowledges the Grand Aerie's First Amendment expressive association argument as follows:

> Although the majority does not discuss it, the Eagles raise a second argument that the Court must address: whether the application of the WLAD to compel the Eagles to accept women unconstitutionally infringes on the group's freedom of expressive association.

Id., 59 P.3d at 674 (Madsen, J., concurring). App. 44. Justice Madsen's concurrence states that she would find that Washington State's compelling interest in eradicating gender discrimination outweighs the Eagles' First Amendment right to expressive association. *Id.*, 59 P.3d at 675. App. 46-47.

A dissenting opinion filed by Justice Sanders also comments on the First Amendment issue. The dissent explains:

> The majority's discussion of the First Amendment associational cases (particularly when supplemented with the recognition of the *Boy Scouts* case) does . . . highlight the significant constitutional question of whether application of Washington's Law Against Discrimination to the membership practices of the Eagles violates their First Amendment right to freely associate. That,

> I suppose, may be the next case; however, suffice to say the majority's strained statutory construction has created a constitutional problem which would be completely avoided were the result otherwise.

Id., 59 P.3d at 682 (Sanders, J., dissenting). App. 64.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Washington Supreme Court Conflicts With This Court's Decision In *Dale v. Boy Scouts Of America.*

The Washington Supreme Court decision in this case holds that a state government may prohibit any organization, regardless of its expressive activities and whether it has any commercial purposes, from utilizing gender-related criteria for membership so long as it is a large organization that aggressively seeks new members. The holding is in conflict with this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

In *Dale*, this Court held that application of New Jersey's public accommodations law to require that the Boy Scouts accept a homosexual man as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association under the First Amendment.

In reaching its conclusion, this Court engaged in a two-part analysis. First, the Court determined that the Boy Scouts engage in "expressive association." Second, the Court determined that the expressive association would be "significantly affected" by forced inclusion of a homosexual leader.

A. Members Of The Fraternal Order Of Eagles Engage In Expressive Association.

Plaintiffs in this case have conceded that the Fraternal Order of Eagles engages in expressive association and no court has ever held otherwise.[3] In *Dale,* this Court explained the standard for determining whether a group engages in expressive association as follows:

> To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

530 U.S. at 648.

Members of the Fraternal Order of Eagles engage in private expressive association by conducting ritualistic meetings and initiation ceremonies and by seeking to inculcate the virtues of brotherly fellowship and charity. Wahls Declaration at ¶ 11. App. 116-17. The meetings and initiation ceremonies express a shared belief in the value of "brotherhood" and "manly virtue." *Id.* In addition to their emphasis on the value of a brotherly relationship among a group of men, the ceremonies express other shared values, including a shared belief in God. *Id.* The rituals are the essence of membership in the Fraternal

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[3] The trial court made its decision before this Court's *Boy Scouts of America v. Dale* case.

Order of Eagles and would be rendered meaningless if not performed among men who view each other as brothers and believe in a Supreme Being. *Id.* Members of the Fraternal Order of Eagles engage in "expressive conduct" as defined by the Supreme Court in *Dale*.

B. Forced Gender Integration Would Significantly Affect The Ability Of Eagles Members To Engage In Private Expression.

In determining whether forced inclusion of a homosexual leader would "significantly affect" the Boy Scouts' right to expressive association, the *Dale* Court rejected the New Jersey Supreme Court's finding that exclusion of homosexuals "appears antithetical to the organization's goals and philosophy." 530 U.S. at 651. This Court explained:

> [I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. *See Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); *see also, Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection").

530 U.S. at 651.

This Court determined that forced inclusion of a homosexual leader would "significantly affect" the Boy

Scouts' expressive association. In reaching this conclusion, this Court "deferred" to the Boy Scouts' own publicly expressed assertion that "homosexual conduct is inconsistent" with the values of Scouting. *Id.* at 652-53.

In this case, the Fraternal Order of Eagles has repeatedly and publicly stated that inclusion of women in aerie rituals would render the rituals meaningless because they could no longer express the value of brotherhood among men. *Id.* At the 1998 meeting of the Grand Aerie, delegates voted overwhelmingly to maintain the organization's male-only membership policy. *Id.* The following excerpt of the published Grand Aerie proceedings regarding this matter makes clear the sincerity of the membership's belief in the value of male brotherhood (and female sisterhood):

> **Brother Vince Marino**: . . .
>
> WHEREAS: Over the years the Auxiliary Sisters have worked side by side with the Aerie brothers to help make their local Aeries prosper. . . .
>
> WHEREAS: We also know that the Fraternal Order of Eagles is not unlike the human body, with the head being the Grand Aerie and the Grand Auxiliary; the torso represents all the individual Aeries and all the individual Aeries and Auxiliaries; **and the most important are the legs for one is the Auxiliary Sisters and the other is the Aerie Brothers. If you weaken either one you will fall!**
>
> **Therefore**: In our opinion, promoting ladies to join the Aerie is promoting the destruction of the **Family and the Fraternal Order of Eagles.**
>
> . . .

> **Therefore**: After all that has been stated above, we believe that a **Male is a Man, a Female is a Woman, a Man is a Brother, a Woman is a Sister; a Brother** belongs to the **Aerie**, a **Sister belongs to the Auxiliary,** and this makes a **Family**. Put it all together and you have the ***Fraternal Order of Eagles!!***

1998 Proceedings of the Grand Aerie at 97-98. App. 139-40. (Emphasis in Original Text).

After the Delegates voted overwhelmingly in favor of the resolution, the Grand Tribunal formally withdrew "Opinion 750," an attempt to substitute the word "person" for "male" in the membership criteria section of the Statutes of the Order. The Proceedings reflect this action as follows:

> **Brother Mike Lagervall:** . . .
>
> This is a Grand Tribunal Order given July 30, 1998. "Given that the Delegates to the 1998 Grand Aerie Convention have voted overwhelmingly to decline to substitute the word 'person' for 'male' in Section 70.2 of the Statutes, Grand Tribunal Opinion No. 750 is hereby withdrawn." (Standing Ovation).

Id. at 147. App. 151.

There is no doubt that the Eagles, like the Boy Scouts, have strongly and publicly asserted their views on this matter. The organization has asserted that inclusion of women in aeries would undermine its ability to engage in expressive association. The Supreme Court in *Dale* held that courts "must . . . give deference to an association's view of what would impair its expression." 530 U.S. at 653. The view of the Fraternal Order of Eagles on this matter

could not be clearer: requiring inclusion of women in aeries would result in "destruction" of the values of brotherhood and sisterhood that are the essence of the organization's expressive association. Including women in aeries would preclude Eagles members from experiencing and expressing their belief in the unique bond among a group of same-sex friends.

Given the strength of the Eagles' convictions about the value of the bond among an all-male brotherhood, the Eagles' interest in expressive association is at least as strong as that of the Boy Scouts. Interpreting the WLAD to mandate forced inclusion of women in Eagles aeries, therefore, causes the statute to violate the First Amendment.

This Court's decision in *Boy Scouts of America v. Dale, supra*, holds that the First Amendment protects private social groups who engage in "expressive association" from governmental interference that significantly affects that expressive association. As set forth in detail in the Statement of Facts above, the Grand Aerie engages in expressive association in the form of ritual practices that emphasize the value of brotherhood and friendship among a group of men and also the value of sisterhood and friendship among a group of women. Forced inclusion of women in aerie rituals would render the ritual expressive practices meaningless because the rituals could no longer express the values of brotherhood among men and sisterhood among women. *See* Wahls Declaration.[4]

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[4] Similarly, forced inclusion of men in female-only rituals would render those ritual expressive practices meaningless.

C. Washington State's Tentative Governmental Interest In Remedying Discrimination Does Not Outweigh The Freedom Of Association Rights Of A Private Non-Commercial Social Club.

Washington State's public accommodations statute expressly exempts "fraternal organizations." Yet the Washington Supreme Court appears to have found a state interest in gender integration at fraternal organizations sufficient to outweigh the Eagles' rights under the First Amendment. Washington's statute falls far short of articulating a state interest that would outweigh the First Amendment.

Recent lower court decisions applying this Court's decision in *Dale* have correctly found that the First Amendment precludes application of gender discrimination laws to the membership decisions of private social groups. In *Donaldson v. Farakhan*, 436 Mass. 94, 762 N.E.2d 835 (Mass. 2002), the Massachusetts Supreme Court concluded that a female plaintiff had presented insufficient evidence that a public theater speech by Louis Farakhan was a "public accommodation." The court held that application of public accommodation laws to a private male-only meeting would violate the First Amendment rights of the participants. The court explained:

> To be afforded First Amendment protection, there is no requirement that an association exist for the particular purpose of disseminating a specific message. *Boy Scouts of Am. v. Dale, supra* at 655. It must merely engage in expressive activity that would be impaired by the unwanted inclusion. *Id.* Here the mosque's men's class was engaging in its religious meeting for men only, expressing concern for the community, and discussing the

> moral ideology and roles of men in addressing crime and violence in the community. The expression of religious viewpoints specific to men of the faith would have been impaired by the inclusion of women in the meeting.

Id. at 841.

In reaching its conclusion, the Massachusetts Supreme Court applied the *Dale* decision, and accepted the all-male group's representation that separation of the sexes at meetings is part of their belief system. The court explained:

> The sincerity of these religious beliefs and practices is not for us to question. See *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 651 (2000), citing *Democratic Party of U.S. v. Wisconsin ex rel. La-Follette,* 450 U.S. 107 (1981), and *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 714 (1981). Rather, we must decide whether the forced inclusion of women in the mosque's religious men's meeting by application of the public accommodation statute would significantly burden the mosque's expressive association. . . .
>
> If the forced inclusion of an unwanted person affects in a significant way the group's ability to advocate public or private viewpoints, it is in violation of the First Amendment. *Dale*, citing *New York State Club Ass'n, Inc. v. City of N.Y.,* 487 U.S. 1, 13 (1988).

Id. at 840. In the present case, forced inclusion of women in aerie meetings (and men in women's auxiliary meetings) would significantly affect members' ability to express their sincere belief in the value of brotherhood among a group of male friends and sisterhood among a group of

female friends. Accordingly, the First Amendment precludes state action to force inclusion of women. *See also, Boy Scouts of America, South Florida Counsel v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (holding that School Board's Action excluding Boy Scouts from facilities because of Board's disagreement with membership criteria would violate First Amendment); *Roman v. Concharty Council of Girl Scouts, Inc.*, 195 F. Supp. 2d 1377 (M.D. Ga. 2002) (holding that Girl Scouts is a bona fide private membership club entitled to First Amendment-based exemption from Title VII and the ADA).

This Court has never held, or even suggested, that a noncommercial, social fraternity or lodge may be subjected to a public accommodations law. This Court's decision in *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988), points to the distinction between this case and cases involving application of discrimination laws to business groups. In the *New York State Club Ass'n* case, this Court evaluated New York City's Human Rights Law prohibiting discrimination in places of public accommodation. Like Wash. Rev. Code 49.60.040(10), the New York law exempted "distinctly private" clubs. 487 U.S. at 4. The City amended the law in 1984 to provide more specific guidance regarding the type of clubs that should be considered exempt. The City wanted to be certain that clubs organized for a business purpose would be covered by the discrimination law. At the same time, the City specifically exempted benevolent orders, including the Eagles, because they had no prevalent business activity. 487 U.S. at 6-7 (citations omitted). New York's Benevolent Orders Law specifically identifies the Eagles as a benevolent order. N.Y. Ben. Ord. Law § 2(17) (McKinney 1951 and Supp. 1999-2000).

A group of private New York clubs and associations challenged New York's amended human rights ordinance. The plaintiffs' claims included an Equal Protection challenge to the exemption for benevolent orders. The Supreme Court upheld the law, determining that the exemption was reasonable because benevolent orders were not engaged primarily in business activity. 487 U.S. at 14-17.

In her concurring opinion, Justice O'Connor highlighted the importance of respecting the expressive association rights of organizations "whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond." *Id.* at 19 (O'Connor, J., concurring). Justice O'Connor also pointed to the distinction between commercial groups and private social groups. *Id.* 19-20.

In a separate concurring opinion, Justice Scalia stated:

> [A]ll the organizations that have been listed [in the Benevolent Orders Law] – or at least all I am familiar with – share the characteristic of being what might be called lodges or fraternal organizations. . . . When the City Council stated that it had heard no testimony that "benevolent orders" were "places where business activity is prevalent," . . . I think it meant by "benevolent orders" organizations of that sort. . . . I am content that it was rational to refer to that law as a means of identifying a category composed almost entirely of such associations; and that it was rational to think that such organizations did not significantly contribute to the problem the City Council

> was addressing. A lodge is not likely to be a club where men dine with clients and conduct business.

487 U.S. at 20 (citations omitted).

For the reasons identified in Justice Scalia's and Justice O'Connor's *New York State Clubs* concurrences, decisions requiring business groups to admit women are inapposite to this case. The Fraternal Order of Eagles is a fraternal organization where business activities do not take place. Organizations like the Eagles which have a social rather than a business purpose have been held to be private clubs entitled to constitutional protection. *See, e.g., Louisiana Debating and Literary Ass'n v. City of New Orleans,* 42 F.3d 1483, 1494-96 (5th Cir.), *cert. denied,* 515 U.S. 1145 (1995); *Cornelius v. Benevolent Protective Order of Elks,* 382 F. Supp. 1182, 1204 (D. Conn. 1974) *See also Boy Scouts of America v. Dale, supra* (non-commercial organization).

On the other hand, where business activities are prevalent, this Court has determined that organizations are not entitled to First Amendment protection of their membership decisions. *See, e.g., Roberts v. U.S. Jaycees,* 468 U.S. 609, 626 (1984); *Board of Dirs. of Rotary Intern. v. Rotary Club,* 481 U.S. 537 (1987). *See also, New York State Club Ass'n,* 487 U.S. 1 (1988).

In addition, unlike business clubs, the Eagles' all-male membership policy is essential to their expressive association. Members would be foreclosed from expressing their belief in the value of the unique bond among an all-male group of friends if forced by the government to admit women to aerie rituals. Unlike the Eagles, groups such as the Rotary and the Jaycees did not view themselves as

"brotherhoods" or perform rituals that express the value of the brotherly bond among a group of men. The Washington legislature recognized this distinction when it exempted "fraternal organizations" from the WLAD. The Washington Supreme Court's misapplication of the WLAD to trample the Eagles' First Amendment rights should not be permitted to stand.

II. The Holding Of The Washington Supreme Court Relates To An Issue Of Overriding National Importance.

The Fraternal Order of Eagles is a national organization with members in all fifty states. Although the decision of the Washington Supreme Court should have no legal effect outside Washington State, the judgment is phrased without geographical limits. Because Eagles members can attend aeries other than their home aerie, the decision has the potential to destroy the Eagles' "familial brotherhood" membership structure throughout the United States.

In addition to the Fraternal Order of Eagles, there are numerous other national organizations that stand to lose their First Amendment rights if the Washington Supreme Court's decision is allowed to stand. There are many social, quasi-religious, non-commercial groups that would be subjected to forced gender integration based on the Washington Supreme Court's ruling. Among these organizations are clubs like the Masons, Eastern Star, Knights of Columbus, and Moose, and, notably, given this Court's recent jurisprudence, the Boy Scouts and Girl Scouts.

The Washington Supreme Court's decision does not even attempt to distinguish this case from this Court's decision in *Boy Scouts of America v. Dale.* Instead, the

Washington Supreme Court defies this Court's holding regarding the First Amendment protection for private social groups that engage in expressive association.

Allowing the Washington Supreme Court's decision to stand would undermine the foundational principles that the First Amendment limits state governments and that this Court has the last word on the nature and scope of that limitation. In that sense, the Washington Supreme Court's decision is no less significant and dangerous than would be a state supreme court decision holding that a state may censor newspaper political editorials or require adherence to a state religion.

If this Court does not grant the writ of certiorari in this case, the Eagles' First Amendment expressive association rights will be irreparably harmed. Throughout this litigation, plaintiffs have pointed to the fact that the Eagles admitted women for several years based on a concern that they were legally obligated to do so as evidence that women do not impair the group's expressive association. The fact that women were briefly admitted persuaded Washington Supreme Court Justice Madsen to reach the conclusion that the group's expressive associational rights were not hindered by admission of women. App. 46. If the Washington Supreme Court decision stands and the Eagles are required to admit women, all future litigation about this issue will be tainted by similar arguments. This Court should give the Eagles a chance to finally resolve this issue on the present factual record.

CONCLUSION

For these reasons, Petitioner Grand Aerie respectfully requests that the Court grant its petition for a writ of certiorari to the Supreme Court of Washington.

Respectfully submitted,

JOHN WARNER WIDELL
Counsel of Record
WIDELL | APPELLATE

Supreme Court of Washington,
En Banc.

FRATERNAL ORDER OF EAGLES, **TENINO** AERIE NO. 564; Kathleen L. Conner; Lanette Davis; Julia A. Foster; Gayle L. Hartman; Kaycee L. Johnson; Annette M. Riley; Diane E. Roberts; Janet Tresenriter; Alice F. Vasser; and Whidbey Island Aerie No. 3418, Petitioners,

v.

GRAND AERIE OF FRATERNAL ORDER OF EAGLES, and Washington State Aerie, Fraternal Order of Eagles Washington State Aerie, Respondents.

No. 71786-9.

Argued June 27, 2002.
Decided Dec. 19, 2002.

Rosemary Daszkiewicz, Maryln Hawkins, Seattle, for Petitioners.

John Widell, Seattle, for Respondents.

Bruce Johnson, *Jeffrey Fisher*, Seattle, Amicus Curiae on behalf of Conference of Private Organizations.

Vanessa Power, Margarita Latsinova, Seattle, Terry Fromson, David Cohen, Philadelphia, PA, Amicus Curiae on behalf of Women's Law Project.

Christine Gregoire, Attorney General, *Maureen Hart, Jeffrey Even*, Asst. Attorneys General, Olympia, Amicus Curiae on behalf of WA State Human Rights Commission.

SMITH, J.

Petitioners, two local chapters of the Fraternal Order of Eagles, Tenino and Whidbey Island Aeries, and several female members of the Tenino Aerie, ask this court to review a decision of the Court of Appeals, Division Two,

which reversed a ruling of the Thurston County Superior Court that the male-only membership policy of the Grand Aerie of the Fraternal Order of Eagles barring admission of new female applicants violated the Washington Law Against Discrimination, chapter 49.60 RCW. We reverse.

QUESTION PRESENTED

The principal question presented in this case is whether the Washington Law Against Discrimination requires a "fraternal organization" to be "distinctly private" in order to qualify for exemption under the law.

STATEMENT OF FACTS

The Fraternal Order of Eagles (Eagles) was organized in this state in 1898.[1] It describes itself as a nonprofit fraternal organization with 1.6 million members worldwide.[2] Its stated purpose, according to its articles of incorporation, is to "[u]nite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality. . . . To promote and raise funds for duly authorized Fraternal Order of Eagles charities and contribute to worthwhile charitable causes." [3] The Grand Secretary of Eagles in a declaration stated the organization

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[1] Clerk's Papers at 866. The Fraternal Order of Eagles was founded on February 6, 1898 in Seattle originally as the Order of Good Things, later changing to its current name.

[2] *Id.* at 786.

[3] *Id.* at 644.

advances only social and charitable activities and that it prohibits promotion of business or economic interests by its members.[4]

In its early history, the Eagles chartered Aeries or chapters in other states with male-only membership. It has continued growth over the years by adding chapters and members worldwide.[5] The Grand Aerie serves as the overarching governing body, creating and enforcing the organization's rules and policies. Each local Aerie must adopt the Eagles' Constitution and policies established by the Grand Aerie.[6] Each state has a State Aerie that holds meetings for discussion of policy issues prior to their annual state conventions.[7]

The Eagles traditionally restricted membership to males over 21 years of age who believe in a Supreme Being, have never been a member of the Communist party or advocated the overthrow of the government, and are of good moral character.[8] An applicant for membership must be sponsored by two members; be interviewed by a committee which recommends the applicant's approval or rejection; and be approved by a majority vote.[9] Within these broad confines, local Aeries are free to establish their own procedures for selecting new members.[10] Regular

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[4] *Id.* at 596.

[5] *Id.* at 597, 866.

[6] *Id.* at 636.

[7] Clerk's Papers at 748.

[8] *Id.* at 669.

[9] *Id.* at 597.

[10] Clerk's Papers at 638.

male-only meetings and gatherings are held at designated times and in accordance with the by-laws for purposes of new member initiations and the conduct of social activities.[11] At these meetings, ceremonies and prayers are performed in strict accordance with secret rituals.[12] According to an Aerie officer, the secret rituals include "mainly references to manly virtue and brotherhood as well as prayers and references to God, [which] are significant and meaningful to members of the Order."[13] Ritual competitions, he claims, are an integral part of state, regional, and national Eagle gatherings, and the presence of women would inhibit these ritual practices which are the essence of membership in the Fraternal Order of Eagles.[14]

Members in Washington State, approximating 66,000, belong to 106 local Aeries.[15] Each local Aerie has a corresponding Auxiliary, patterned after the Eagles' exclusively male orders, that admits only women.[16] Members of both the Eagles and the Auxiliary are permitted to use local Aerie facilities when available, and bring nonmember guests of either gender to the local chapter's club or social room.[17] On occasion, local Aeries rent their facilities to the public for special events.[18] In Washington, some local

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[11] *Id.* at 935-36.

[12] *Id.* at 598.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 747.

[16] Clerk's Papers at 866.

[17] *Id.* at 598, 647.

[18] *Id.* at 598.

chapters serve lunch to members and non-members willing to pay, and hold public dances.[19] Both male and female nonmembers attend national conventions in which nonmember guest speakers participate. Local Aeries also host weekly and monthly dinners, holiday celebrations, evening activities, and civic events – some of which are open to members, their families, guests, and, on occasion, to the public.[20]

On November 27, 1995, the judicial branch of the Eagles, the Grand Tribunal, issued its formal Opinion 750 stating that the organization's male-only membership policy was inconsistent with prevailing civil law on gender discrimination.[21] Following issuance of the opinion, Respondents and other local Aeries, including Olympia, Gig Harbor, and Spokane Valley, began admitting women as

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[19] *Id.* at 153-54.

[20] *Id.* at 152.

[21] *Id.* at 819. Opinion Number 750 reads in pertinent part:

> Our review of relevant civil cases, involving not only the Fraternal Order of Eagles, but other private organizations confirms that the Courts have consistently upheld legislation designed to prevent discriminatory membership policies in private clubs when such policies are based solely on gender. Given these interpretations, our fraternal laws must then yield to prevailing civil law.
>
> It is the opinion of the Grand Tribunal that the use of the word 'male' appearing at Section 70.2 of the Statutes is not consistent with prevailing civil law. This prevailing civil law takes precedent over our laws on this subject. The Grand Aerie will impose no restrictions upon membership in the Local Aerie, on the basis of gender. To the extent that prior Opinions 698, 698-A and 700 are inconsistent herewith, they are expressly overruled.

members with equal membership rights and privileges.[22] At the Grand Aerie convention in July 1998, an attempt was made by motion to amend its Articles of Incorporation and Constitution to conform to the opinion of the Grand Tribunal by substituting "person" for "male" in the membership provisions. The proposed amendment was defeated.[23] The Grand Aerie subsequently withdrew Opinion 750 and issued a letter to all local chapters stating that "[a]s of July 30, 1998 it is a violation of the statutes to propose a female applicant into the Aerie. . . . "[24] However, the letter stated that women granted Aerie membership between 1995 and 1998 retained full membership status.[25]

On July 20, 1999, by amended complaint, local Aeries, Tenino Number 564 and Whidbey Island Number 3418, and nine female members of the Tenino chapter sued the Grand Aerie in the Thurston County Superior Court, claiming that the male-only admission policy violated the Washington Law Against Discrimination (WLAD) and Washington's Equal Rights Amendment; and stating that reversing the policy would not impinge on the Eagles' right of free association.[26] Upon completion of pretrial discovery, Petitioners moved for summary judgment on the grounds that the WLAD prohibited the Eagles' gender discrimination practice in "public accommodations."[27] In response, the Grand Aerie filed a cross-motion for summary judgment,

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[22] Clerk's Papers at 639.

[23] *Id.* at 821-22.

[24] *Id.* at 825.

[25] *Id.* at 823.

[26] *Id.* at 569-79, 1016-23.

[27] *Id.* at 569-79, 1016.

asserting that RCW 49.060.040(10) provided an absolute exemption from application of the statute for fraternal organizations such as the Eagles.[28] Respondent Eagles asserted they were covered under the language of RCW 49.60.040(10) exempting "any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations."[29]

The trial court, the Honorable Richard A. Strophy, interpreted RCW 49.060.040(10) as indeed exempting "fraternal organizations" from the WLAD, but only if the organizations could prove they were "distinctly private" in nature.[30] Considering the size of the Eagles' operations and membership recruitment programs, the trial court determined the organization was "public" in nature, falling outside the exemption.[31]

In his extensive oral ruling on January 28, 2000, Judge Strophy included the following statement:

> I conclude . . . that "fraternity" has as much do with a shared common purpose than it does with a men's club, if you will. And so looking not only to acts and practices, but to the defendants' own literature, and listening to the arguments of counsel, I find and conclude that there are no material facts about which there's a genuine dispute regarding the FOE [Fraternal Order of Eagles]'s aggressive and wide range of membership

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[28] Clerk's Papers at 580-94.

[29] RCW 49.60.040(10).

[30] Pet. for Review at App. C.

[31] *Id.*

enhancement programs and goals, such that I conclude that the selectivity of membership is minimal in the Eagles.

The next factor for review by the Court in determining whether or not an organization is distinctly private is its size. Local Aeries in Washington average over 600 members. The state aeries have over 66,000. Nationally or internationally, there's approaching a million to over a million. But, certainly, the Court finds that the membership size and the membership enhancement programs are markedly different from those clubs or groups under scrutiny in the case law cited to the Court, such that in terms of considering and applying that factor, that one consideration, the size of Eagles and the local Aeries would militate against a finding that Fraternal Order of Eagles is distinctly private.

The next consideration is whether or not the community and the protected class – women – can participate in activities of the organization. It is, in my assessment of the record before me, beyond cavil or genuine dispute that the Eagles are an active outreach organization in the community that involves community members to participate in projects to aid other community members who are nonmembers and involves nonmembers in the activities of the organization from time to time such that I could not, given consideration to that factor, conclude that the Fraternal Order of Eagles is distinctly private.

Another factor is how admission of women would affect the male members' rights of association. The Grand Aerie and State Aerie argue, "Well, this is a brotherhood and we have rituals, and it would significantly and adversely affect the ability of the

brotherhood to maintain this close familial relationship and observe its rituals if women were admitted." Counsel has done a very good job, in my view, on this point of arguing vigorously for his clients, the Defendants Grand and State Aeries. And with all due respect to counsel in that regard, even the most skillful of us as attorneys have never been really able to make a silk purse out of a sow's ear, and on this issue, what is fatal to the Grand Aerie's position is that women have been allowed to remain. What does that say to the Aerie's intense argument that we can't be the club we want to be if we have women? If that was true and if that was a laudable and valid position, then the Grand Tribunal should not only have withdrawn its Opinion 750, but decreed that, henceforth, all current female members must be expelled and excluded to preserve this precious fraternal relationship that we must foster in order to be the organization our literature says we seek to be.

Because it is the essence of the Washington Law Against Discrimination to prohibit discrimination against persons which would deny them full enjoyment of any places of public accommodation because of gender, it does matter whether the challenged organization, even a fraternal organization, is distinctly private or not, and that consideration is more significant tha[n] whether it's composed only of men or only of women. I conclude, therefore, that, in that context, the terms "fraternal organization" and "distinctly private" are sufficiently ambiguous to warrant this court to construe the exception – in light of the liberal purpose of the statute – strictly and in a way that reinforces accomplishment of that purpose.

> And this conclusion is arrived at in light of the requirement that the Fraternal Order of Eagles Grand and State Aeries have the burden of convincing this Court that the Fraternal Order of Eagles comes within the exception. The burden is not on the plaintiffs to establish that the Grand and State Aeries are not within the exception or exemption. And if there even be that burden, the plaintiffs have sustained it.
>
> In coming to the decision I have come to, to grant the plaintiffs' motion for summary judgment that the conduct of the Grand and State Aerie is in violation of the Washington Law Against Discrimination by restricting membership in the aeries to only males, I have not done so lightly. I have done so with the recognition that persons do have the right to associate and restrict their associations in a way that could be based upon gender or other considerations such as a specific religious denomination, but that is only when they are strictly or distinctly private in activity and nature. There is nothing about the Fraternal Order of Eagles, almost a million strong across this country, that tells me that its goals, its purpose or its conduct is distinctly private. It is the opposite. And I congratulate the Eagles because of that. I think that's what makes it vital and valid and wonderful.

On March 24, 2000 the trial court granted Petitioners' summary judgment motion, concluding that the Eagles may not discriminate on the basis of gender and must admit women into membership. The court granted summary judgment to Respondent Eagles on Petitioners' claim

of violation of the Equal Rights Amendment to the Washington Constitution and the Consumer Protection Act.[32]

Respondent Eagles filed a timely appeal, arguing that the trial court erred in its interpretation of the statute and in its conclusion that there remained no issue of material fact concerning the organization's public or private status.[33] On August 3, 2001 the Court of Appeals, Division Two, the Honorable C.C. Bridgewater writing, reversed the trial court, concluding that RCW 49.60.040(10) is not ambiguous and, under a literal interpretation of the statute, fraternal organizations such as Respondent Grand Aerie of the Fraternal Order of Eagles are "automatically excluded" because the wording of the statute indicates the Legislature exempted them from its application without the necessity of examining whether they are "distinctly private."[34]

Briefs amicus curiae urging reversal were filed by The Women's Law Project; Washington Women Lawyers; National Association for the Advancement of Colored People; Washington State National Organization for Women; American Association of University Women of Washington; Washington Chapter of the National Council of Jewish Women; Anti-Defamation League; California Women's Law Center; Center for Women Policy Studies; Feminist Majority and Feminist Majority Foundation;

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[32] *Id.* at 71-74.

[33] Br. of Appellant at 2.

[34] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie, Fraternal Order of Eagles,* 108 Wash.App. 208, 217, 27 P.3d 1254 (2001).

National Gay and Lesbian Task Force; NOW Legal Defense and Education Fund; Trial Lawyers For Public Justice; Women Employed; Washington State Human Rights Commission; and the Washington Attorney General.

A brief amicus curiae urging affirmance was filed by the Conference of Private Organizations.

This court granted review on April 2, 2002.

DISCUSSION

At issue in this case is the question whether the Court of Appeals erred in its reading of the Washington Law Against Discrimination to automatically exclude *fraternal organizations* from application of the prohibitions in RCW 49.60.040(10) and that fraternal organizations are included in the exemption for "any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations."[35]

During oral argument before this court counsel for Petitioners and Respondents expressed agreement that, under the principles of summary judgment law, there remained no material fact to be determined by the trial court in this case.

WASHINGTON LAW AGAINST DISCRIMINATION

The Washington Law Against Discrimination (WLAD), originally enacted in 1949, is a broad remedial statute, the

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[35] *Id.;* RCW 49.60.040.

purpose of which is to prevent and eradicate discrimination on the basis of race, creed, color, national origin, sex or disability in "public accommodations."[36] The Act recognizes that the right to be free from such discrimination is a civil right enforceable in private civil actions by members of the enumerated protected classes.[37] Although the rights enumerated include employment, public accommodation, assemblage and amusement, the protected rights are not limited to those.[38]

The Act created a state agency, later designated in 1971 as the Washington State Human Rights Commission, and granted it jurisdiction and powers to carry out the provisions of the Act and the "policies and practices of the commission in connection therewith."[39] The Commission is authorized to "receive, impartially investigate, and pass upon complaints alleging unfair practices" defined by the Act.[40]

"Public accommodation" is broadly defined to include:[41]

> [A]ny place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any

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[36] *Marquis v. City of Spokane,* 130 Wash.2d 97, 109, 922 P.2d 43 (1996); RCW 49.60.010.

[37] RCW 49.60.030.

[38] *See* RCW 49.60.030(1).

[39] RCW 49.60.120(3); *See Phillips v. City of Seattle,* 111 Wash.2d 903, 908, 766 P.2d at 1099 (1989). RCW 49.60.050.051, -120(3).

[40] RCW 49.60.120(4).

[41] RCW 49.60.040(10).

> property or facilities . . . or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or . . . where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls. . . .

An exception to the "public accommodation" definition reads:[42]

> PROVIDED, That *nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter;* nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;

The parties disagree on their interpretation of RCW 49.60.040(10). Respondents argue that since the language of the exception is clear and unambiguous, application of statutory construction principles to interpret it violates the well-established rule that "a statute which is clear on its face is not subject to interpretation."[43] They contend that a plain reading indicates the Legislature did not intend the phrase "which is by its nature distinctly private" to modify

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[42] *Id.* (emphasis added).

[43] Br. of Appellant at 12-14 (quoting *Marquis,* 130 Wash.2d at 108, 922 P.2d 43).

"fraternal organizations," and instead intended to expressly exclude all fraternal organizations regardless whether private or public.[44]

Petitioners counter with the argument that the statute is grammatically flawed, thus creating an ambiguity which requires the court to apply rules of statutory construction.[45] They claim that instead of creating a separate exception only for groups bearing the designation fraternal organization, the wording and structure of the statute indicate the Legislature intended to create two general categories of exceptions: (1) a religious entity exception and (2) a private entity exception.[46] Fraternal organizations come within the private entity exception, they assert, because to otherwise construe it creates an absurd result by allowing any group designated as a "fraternal organization" to avoid compliance with the WLAD. The WLAD, they maintain, requires that fraternal organizations be distinctly private before the exemption applies, the same requirement as that for an "institute," a "bona fide club," or a "place of accommodation."

STATUTORY INTERPRETATION

The construction of a statute is a question of law that this court reviews de novo.[47] In interpreting a statute, the

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[44] *Id.* at 12-16.

[45] Br. of Resp'ts at 17-24.

[46] *Id.* at 18-20.

[47] *State v. Keller,* 143 Wash.2d 267, 276, 19 P.3d 1030 (2001); *Rettkowski v. Dep't of Ecology,* 128 Wash.2d 508, 514-15, 910 P.2d 462 (1996).

primary objective of the court is to ascertain and carry out the intent and purpose of the Legislature in creating it.[48] To determine legislative intent, this court looks first to the language of the statute. If the statute is unambiguous, its meaning is [sic] be derived from the plain language of the statute alone.[49]

Legislative definitions provided in a statute are controlling, but in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary.[50] This court, however, will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.[51] "The spirit or purpose of an enactment should prevail over . . . express but inept wording."[52]

An unambiguous statute is not subject to judicial construction.[53] "A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable."[54] This court is not "obliged to discern any ambiguity by imagining a variety of alternative interpretations."[55]

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[48] *State v. Sullivan,* 143 Wash.2d 162, 174-75, 19 P.3d 1012 (2001); *State v. Chester,* 133 Wash.2d 15, 21, 940 P.2d 1374 (1997).

[49] *Keller,* 143 Wash.2d at 276, 19 P.3d 1030.

[50] *Sullivan,* 143 Wash.2d at 174, 19 P.3d 1012.

[51] *State v. McDougal,* 120 Wash.2d 334, 350, 841 P.2d 1232 (1992).

[52] *State v. Day,* 96 Wash.2d 646, 648, 638 P.2d 546 (1981).

[53] *Keller,* 143 Wash.2d at 276, 19 P.3d 1030.

[54] *Id.*

[55] *Id.* at 277, 19 P.3d 1030.

The first role of a court is to examine the language of a statute while adhering to the Legislature's intent and purpose in enacting it. Following that precept, the Court of Appeals used rules of punctuation and grammar in analyzing the statute to determine legislative intent. The punctuation, the court noted, sets "fraternal organizations" apart from "institute," "club," and "place of accommodation." It noted that those three terms are connected by commas and the word "or" indicating they are alternatives to each other and meant to be read together as a common idea. The Legislature, the court concluded, purposely did not include "fraternal organizations" in the list because such organizations do not share a similar connection.

The Court of Appeals indicated that the words "fraternal organizations" which separate the phrase "which is by its nature distinctly private," according to rules of grammar, is known as an adjective clause or relative clause.[56] Courts construe relative and qualifying words and phrases, both grammatically and legally, to refer to the last antecedent if a contrary intention does not appear in the statute.[57] The reason for this rule, the court noted, is to make clear what is being modified. Accordingly, the court concluded that the relative clause modifies the three antecedent nouns "institute," "club," and "place," but not

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[56] *Fraternal Order of Eagles, Tenino Aerie No. 564,* 108 Wash.App. at 214-16, 27 P.3d 1254 (citing *Caughey v. Employment Sec. Dep't,* 81 Wash.2d 597, 602, 503 P.2d 460 (1972)).

[57] *In re Application of Andy,* 49 Wash.2d 449, 302 P.2d 963 (1956); *see, e.g., Caughey,* 81 Wash.2d at 602, 503 P.2d 460 ("[W]here no contrary intention appears in a statute, relative and qualifying words and phrases refer to the last antecedent.").

"fraternal organizations" because those two words follow the clause.[58]

The Court of Appeals rejected Petitioners' argument that the word "including" brings "fraternal organizations" into the same group of words as the three antecedent nouns. Instead, the court noted the word "including" is a synonym for the word "and." Based on this grammatical analysis, the court concluded the Legislature had determined that "fraternal organizations" are "distinctly private."[59]

Petitioners provide an alternative rule of grammar in response to the decision of the Court of Appeals.[60] They assert that a phrase beginning with the word "which," preceded by a comma, denotes a nonrestrictive clause.[61] They assert that a nonrestrictive clause provides "supplemental, nondefining information" that is "so loosely connected with the essential meaning of the sentence that [it] might be omitted without changing the meaning."[62] A restrictive clause, they argue, begins with the word "that," and "gives essential information about the preceding nouns." Use of the word "which," instead of the word "that," they claim, indicates the words "including fraternal organizations" were intended as nothing more than an example of the preceding words "institute, bona fide club,

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[58] *Fraternal Order of Eagles, Tenino Aerie No. 564,* 108 Wash.App. at 215, 27 P.3d 1254.

[59] *Id.*

[60] Resp't's Mot. for Recons. at 7.

[61] *Id.* at 7 (citing Brian A. Garner, A DICTIONARY OF MODERN AMERICAN USAGE, 648 (1998)).

[62] *Id.* at 8.

or place of accommodation, which is by its nature distinctively private. . . . "[63]

The two semicolons in the "public accommodation" definition, Petitioners contend, support their claim of two exceptions and undercut Respondents' assertion that the "fraternal organizations" category stands alone as a third separate, unqualified exemption.[64] Petitioners assert that the two semicolons separate the language creating the private entities exception from the language creating the religious entities exception. They argue that setting off the words "fraternal organizations" by commas indicates they are part of the private entities exception.[65]

The statute is not necessarily ambiguous simply because of two different interpretations. The question, however, is whether those interpretations are sufficiently reasonable to warrant further inquiry. It is not always necessary to strictly adhere to technical grammatical rules in interpreting statutory provisions.[66] However, we conclude in this case that RCW 49.60.040(10) is ambiguous.[67]

Petitioners argue that because the Court of Appeals did not acknowledge ambiguity, it did not interpret the statute in accord with cases requiring courts to construe

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[63] *Id.* at 7.

[64] Br. of Resp't at 21-22.

[65] *Id.*

[66] *Duke v. Johnson,* 123 Wash. 43, 49, 211 P. 710 (1923).

[67] *Keller,* 143 Wash.2d at 276, 19 P.3d 1030.

ambiguous statutes "'in a manner that best fulfills the legislative purpose and intent.'"[68]

Since the WLAD does not define "fraternal organizations" and "clubs," the words may be given their ordinary meaning by reference to a standard dictionary.[69] Both "club" and "fraternity" (from which "fraternal" is derived) are defined as an association of persons organized for a common object or purpose.[70] From this we conclude the trial court correctly determined that "club" and "fraternal organizations" are of the same nature.

Application of the ordinary meaning of the words "club" and "fraternity" to RCW 49.60.040(10), however, nevertheless still leaves a strained result. It does not seem logical that the Legislature would exempt only those groups organized for a common purpose which are distinctly private, and at the same time allow a group similarly organized for a common purpose to avoid proving its private status simply by designating itself a "fraternal organization." Petitioners point out that with no legislative guidance on the distinction between the words, a

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[68] *State ex rel. Royal v. Bd. of Yakima County Comm'rs,* 123 Wash.2d 451, 459, 869 P.2d 56 (1994) (quoting *In re Marriage of Kovacs,* 121 Wash.2d 795, 804, 854 P.2d 629 (1993)).

[69] *Cockle v. Dep't of Labor & Indus.,* 142 Wash.2d 801, 808, 16 P.3d 583 (2001).

[70] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 430, 930 (3d ed.1993) defines "club" as "an association of persons for social and recreational purposes or for the promotion of some common object. . . ." "Fraternal" is defined as "of, or relating to, or being a fraternity. . . ." "Fraternity" is defined as "a group of people associated or formally organized for a common purpose, interest, or pleasure as . . . [a] fraternal order. . . ."

conceivable risk would be that any group with malign discriminatory purposes could avoid application of the WLAD under the "fraternal organizations" exemption regardless of the group's private or public status.[71] They argue that any inconsistency in the language of the statute would be resolved by interpreting the term "fraternal organizations" as an entity exempted only if private in nature.[72]

In ascertaining legislative intent, this court resorts to legislative history, statutory construction, and relevant case law.[73]

LEGISLATIVE HISTORY

After Washington was admitted to statehood, the Legislature in 1889 enacted the State's first antidiscrimination law, a civil rights act, which granted to all persons "full and equal enjoyment of the public accommodations . . . applicable alike to all citizens of whatever race, color or nationality."[74] In 1895, an amendment to the act introduced the general designation of "public places."[75] The Act was later codified in 1909 and has since expanded the scope of what now constitutes places of "public accommodation."[76]

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[71] Resp'ts' Mot. for Recons. at 22-23.

[72] *Platt Elec. Supply, Inc. v. City of Seattle,* 16 Wash.App. 265, 277, 555 P.2d 421 (1976), *review denied,* 89 Wash.2d 1004 (1977).

[73] *Cockle,* 142 Wash.2d at 808, 16 P.3d 583.

[74] *Powell v. Utz,* 87 F.Supp. 811, 815 (E.D.Wash.1949).

[75] *Id.*

[76] *Id.; see also Browning v. Slenderella Sys. of Seattle,* 54 Wash.2d 440, 445-46, 341 P.2d 859 (1959) (holding a beauty salon's discrimination of an African American because of her race violated the public

(Continued on following page)

Historically, the civil rights statute, as amended in 1953, RCW 9.91.010, has provided a private cause of action for damages and remedies for persons suffering discrimination because of race.[77] Although the civil rights statute in its definition of places of public accommodation similarly exempts "any institute, bona fide club, or place of accommodation, which is by its nature distinctly private," it does not include "fraternal organizations" as does the WLAD.[78] The definitions of public accommodation in the civil rights statute and the WLAD initially appear similar, but they are not in fact identical. This court distinguished the two, noting that a civil action for damages for discrimination was rarely resorted to in this state because of the preference of those suffering discrimination to avail themselves of administrative procedures provided by chapter 49.60 RCW by which persons in minority groups secured their civil rights through decrees announced in proceedings before what is now called the Human Rights Commission.[79]

In 1949, the Legislature enacted the WLAD to prevent and eliminate discrimination based on race, creed, color, or

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accommodation laws; also noting that in reenacting the 1909 public accommodation act, the Legislature added an additional subsection expanding the meaning of "public accommodation" to remove judicial limitations placed on the act in this court's decisions in *Goff v. Savage,* 122 Wash. 194, 210 P. 374 (1922) (holding that a soda fountain in a drugstore was not a place of public accommodation); and *Finnesey v. Seattle Baseball Club,* 122 Wash. 276, 210 P. 679 (1922) (holding a baseball park was not a place of public accommodation)).

[77] *Browning,* 54 Wash.2d at 445-46, 341 P.2d 859.

[78] *See* RCW 9.91.010(1)(d); RCW 49.60.040(10).

[79] *Browning,* 54 Wash.2d at 446, 341 P.2d 859.

national origin in employment.[80] The general civil right prohibiting discrimination covered fewer protected classes and was limited to employment.[81] The Act also required liberal construction of its provisions to carry out its purposes and granted the State Board Against Discrimination[82] jurisdiction and powers to carry out the purposes of the Act.[83] The Act, however, did not provide for private civil actions. The State Board had exclusive jurisdiction over enforcement of the Act.

The Legislature in 1957 passed House Bill 25 which rewrote the Act's definition section to include the language that "nothing herein contained shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this act."[84] The Senate amended the engrossed House Bill to add ", including

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[80] *Marquis v. Spokane,* 130 Wash.2d at 105-06, 922 P.2d 43.

[81] *See* Laws of 1949, ch. 183, § 12.

[82] The Washington State Board Against Discrimination was renamed the Washington Human Rights Commission in 1971. RCW 49.60.051.

[83] *See* Laws of 1949, ch. 183, §§ 1, 4.

[84] *See* Washington Law Against Discrimination, Laws of 1957, ch. 37, § 4; H.B. 25, 1957 Leg., 35th Leg., Reg. Sess. (Wash.1957). On February 7, 1957, in the second reading of the H.B. 25, the Judiciary Committee recommended that the Bill pass with the following amendment: "In section 15, page 9, lines 26 and 27 of the original bill . . . after the word *'religious'* and before the word *'sectarian'* strike the word *'or'* and insert in lieu thereof a comma (,); and after the word *'institution'* and before the word *'from'* insert the following: ', or *fraternal organizations.'*"

fraternal organizations," following the words "distinctly private."[85]

Since its enactment, over the next five decades the scope of the Act has expanded to its current broad remedial form. The Act was amended in 1957 to provide any person the right to pursue any action or remedy for a violation of that person's civil rights.[86] In 1967, this court held that a barber shop was a place of public accommodation and the owner's refusal to provide service to an African American violated the WLAD.[87] Although the right to pursue a cause of action for violation of the general civil right to be free from discrimination and free from unfair practices was established by 1973, the jurisdiction of the Human Rights Commission continued to be limited to unfair practices.[88] The Legislature has broadened the scope of the Act by amending it to cover unfair practices in financial institutions, credit transactions, insurance transactions, and real estate transactions.[89]

LEGISLATIVE PURPOSE

The legislative purpose of the WLAD is codified in RCW 49.60.010 which provides:

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[85] H.B. 25, 1957 Leg., 35th Leg., Reg. Sess. (Wash.1957). *See* RCW 49.60.040(10).

[86] *See* Washington's Law Against Discrimination, Laws of 1957, ch. 37, § 2.

[87] *In re Johnson,* 71 Wash.2d 245, 427 P.2d 968 (1967).

[88] *See Washington State Human Rights Commission ex rel. Spangenberg v. Cheney Sch. Dist. No. 30,* 97 Wash.2d 118, 126-28, 641 P.2d 163 (1982).

[89] *See* RCW 49.60.175; .176; .178; .222.

> This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability

This court has held that the purpose of the WLAD – to deter and eradicate discrimination in Washington[90] – is a

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[90] *Marquis,* 130 Wash.2d at 109, 922 P.2d 43 (citing *Mackay v. Acorn Custom Cabinetry, Inc.,* 127 Wash.2d 302, 309-10, 898 P.2d 284 (1995); *Burnside v. Simpson Paper Co.,* 123 Wash.2d 93, 99, 864 P.2d 937 (1994)).

policy of the highest order.[91] The WLAD contains a sweeping policy statement that strongly condemns many forms of discrimination, but does not limit its reach to employment discrimination.[92] Instead, the WLAD also guarantees the right to be free from discrimination in nonemployment matters.[93] The Legislature has progressively broadened the scope of the WLAD since its enactment, both with regard to the types of covered facilities and with regard to the protected groups. In 1973, the Legislature added discrimination on the basis of sex as one type of conduct prohibited by the WLAD.[94]

The WLAD requires liberal construction of its provisions in order to accomplish the purposes of the law and states that nothing contained in the law shall "be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights."[95] Additionally, its exceptions should be narrowly construed.[96]

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[91] *Id.* (citing *Allison v. Hous. Auth.*, 118 Wash.2d 79, 86, 821 P.2d 34 (1991)).

[92] *Mackay*, 127 Wash.2d at 310, 898 P.2d 284.

[93] *Marquis*, 130 Wash.2d at 105-06, 922 P.2d 43.

[94] Laws 1973, ch. 141, § 1.

[95] RCW 49.60.020.

[96] *Phillips v. City of Seattle*, 111 Wash.2d 903, 908, 766 P.2d 1099 (1989).

OTHER JURISDICTIONS

Other states have enacted legislation similar to the WLAD.[97] Most jurisdictions follow the religious and private exemption dichotomy, and allow their courts to determine whether particular entities fit within either category.

Courts in other jurisdictions consider "fraternal organizations" within the definitional scope of "bona fide clubs" which are exempt under state and federal anti-discrimination laws if determined to be distinctly private in nature.[98] In jurisdictions where no distinction is made between fraternal organizations and clubs, both are examined under the same standards.[99] Those courts apply the same standards in determining whether an association is sufficiently private to warrant exemption under anti-discrimination laws.[100] Courts have centered their analyses

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[97] *See* Or.Rev.Stat. 695A.403; Minn.Stat. 363 (excluding fraternal corporations if religious in nature); Md.Code Ann. Art. 49B § 5.

[98] *United States v. Trs. of Fraternal Order of Eagles, Milwaukee Aerie No. 137,* 472 F.Supp. 1174 (E.D.Wis.1979) (denying summary judgment motion on the basis that a factual issue existed as to whether the Fraternal Order of Eagles is a private club and therefore exempt from the Civil Rights Act of 1964 which excluded "a private club or other establishment not in fact open to the public)." *Lahmann v. Grand Aerie of Fraternal Order of Eagles,* 180 Or.App. 420, 43 P.3d 1130, *review denied,* 334 Or. 631, 54 P.3d 1041 (2002) (finding that the Public Accommodation Act applies to the Eagles' membership policy and remanding the case to determine if it is distinctly private in nature).

[99] *U.S. Jaycees v. McClure,* 305 N.W.2d 764 (Minn.1981), (concluding the Jaycees organization was a public business); *Rogers v. Intern'l. Assn. of Lions,* 636 F.Supp. 1476, 1478-79 (E.D.Mich.1986).

[100] *U.S. Jaycees v. McClure,* 305 N.W.2d at 770 (citing *Nesmith v. Young Men's Christian Ass'n. of Raleigh, N.C.,* 397 F.2d 96 (4th Cir.1968); *Cornelius v. Benevolent Protective Order of Elks,* 382 F.Supp. 1182 (D.Conn.1974); *Wright v. Cork Club,* 315 F.Supp. 1143 (S.D.Tex.1970)).

on whether the group as an entity carries on commercial activities, among other factors.[101] Those groups where business conduct is prevalent are considered public in nature and subject to a state's anti-discrimination laws.[102]

Respondents contend decisions requiring clubs to admit women when the clubs' business activities are prevalent are not relevant because the special exemption of fraternal organizations is not inconsistent with our State's goal of preventing discrimination in access to business and professional, instead of merely social, opportunities. This contention, however, is based upon an incorrect assumption that our Legislature has determined fraternal organizations to be private social entities when they are not engaged in any major business activity.

Examining the business character of an organization to determine whether a state's public accommodation statute applies is but one factor among several the courts consider in their analyses.[103] Two cases in other jurisdictions, *United States Jaycees v. McClure* and *Rotary Club of Duarte v. Board of Directors of Rotary International,* are

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[101] *U.S. Jaycees v. McClure,* 305 N.W.2d at 769-70; *Rotary Club of Duarte v. Bd. of Dirs. of Rotary Int'l,* 178 Cal.App.3d 1035, 224 Cal.Rptr. 213 (1986).

[102] *Id.*

[103] *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 546, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); *Roberts v. U.S. Jaycees,* 468 U.S. 609, 620, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *Rogers v. Int'l Ass'n of Lions Clubs,* 636 F.Supp. 1476, 1479 (E.D.Mich.1986); *Trs. of Fraternal Order of Eagles, Milwaukee Aerie No. 137,* 472 F.Supp. at 1175-76.

consistently cited for this contention.[104] Both cases involved challenges to an organization's male-only membership policies under state anti-discrimination laws. Both state laws under review, California's Unruh Act and Minnesota's Human Rights Act, contained language prohibiting discrimination in "business establishments and facilities."

The California Court of Appeal in *Board of Directors of Rotary International* concluded that Rotary satisfied the definition of a business establishment because of its "businesslike attributes," which included its large staff, extensive publishing activities, and complex structure which encouraged recruitment of professionals and businessmen to generate commercial benefits among members.[105] Although the California Supreme Court denied review, the case was ultimately considered by the United States Supreme Court.[106] The Minnesota Supreme Court similarly found the Jaycees were in the business of selling goods (leadership skills) and privileges (business contacts and employment promotions) in exchange for membership dues.[107] Both cases were later appealed to the United States Supreme Court. In both *Roberts v. United States Jaycees* and *Directors of Rotary International v. Rotary*

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[104] *See U.S. Jaycees v. McClure,* 305 N.W.2d at 764 (Minn.1981); *Rotary Club of Duarte v. Bd. of Dirs. of Rotary Int'l,* 178 Cal.App.3d 1035, 224 Cal.Rptr. 213, (1986), aff'd, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987).

[105] *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 542-43 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987).

[106] *Id.* at 543, 107 S.Ct. 1940.

[107] *McClure,* 305 N.W.2d at 772.

Club of Duarte,[108] the Supreme Court did not review the state law issues, but decided only whether the state laws, as applied, violated the organizations' first amendment rights to intimate or expressive association.

Within this context, the Supreme Court in *Roberts v. United States Jaycees* announced a list of factors to serve as a framework for distinguishing "private organizations" from "public accommodations." The factors include size, purpose, policies, selectivity, congeniality, and other characteristics pertinent to the particular case.[109] This analysis has found expression in a line of gender discrimination cases involving challenges to male-only membership policies of organizations.[110]

Like other states' public accommodation laws, the WLAD reaches the membership policies of organizations.[111] The Minnesota Supreme Court in *United States Jaycees v. McClure* noted the meaning of "place of public accommodation" has expanded from fixed locations to mobile sites to business facilities of any kind whose goods and privileges are made available to the public.[112] But courts have cautioned

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[108] 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987).

[109] *Roberts,* 468 U.S. at 620, 104 S.Ct. 3244.

[110] *Rotary Club of Duarte,* 481 U.S. at 537, 107 S.Ct. 1940; *Roberts,* 468 U.S. at 612, 104 S.Ct. 3244; *Rogers,* 636 F.Supp. at 1478; *Trs. of Fraternal Order of Eagles, Milwaukee Aerie No. 137,* 472 F.Supp. at 1175-76.

[111] *See, e.g., Rotary Club of Duarte,* 481 U.S. at 537, 107 S.Ct. 1940; *Roberts,* 468 U.S. at 616, 104 S.Ct. 3244; *Rogers,* 636 F.Supp. at 1478-79; *Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137,* 472 F.Supp. at 1175-76; *Lahmann,* 180 Or.App. at 422, 43 P.3d 1130.

[112] *McClure,* 305 N.W.2d at 767.

that this factor alone should not be the sole basis for determining whether an organization is private in nature because business benefit might arise from any association, encounter or meeting.[113] In this case the trial court considered the claim that the Eagles' policy forbids members from promoting business interests or engaging in economic activities while participating in an Eagles activity. In oral argument counsel for Respondents carefully confined this to *ritual activity* only.

Other jurisdictions, while observing the "public business facility" standard, emphasize the "open invitation" standard to define a "public accommodation" and to distinguish the essential character of an organization.[114] Inquiry entails examining the selectivity of the organization in membership practices and scrutinizing whether the invitation to gather is open to the public. We agree that the factors announced in *Roberts* provide an appropriate foundation for determining whether the WLAD exemption under RCW 49.60.040(10) applies to the Fraternal Order of Eagles.

DETERMINING THE PRIVATE OR PUBLIC NATURE OF AN ORGANIZATION

Our case law has not identified what constitutes a "distinctly private" club. We have looked to federal cases to determine what makes a club "private" for purposes of

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[113] *La. Debating & Literary Ass'n v. City of New Orleans,* 42 F.3d 1483, 1494-95 (1995).

[114] *Kiwanis Int'l v. Ridgewood Kiwanis Club,* 806 F.2d 468, 473-74 (3d Cir.1986).

enforcing state anti-discrimination laws.[115] Courts have found guidance from the United States Supreme Court in *Roberts* which announced a list of factors to be used as a framework for inquiry.[116] That list includes a query into an organization's (1) size, (2) purpose, (3) policies, (4) selectivity, (5) public services offered, (6) practices (whether women and nonmembers participate in activities and how the admission of women would affect the members' rights of association), and (7) other characteristics pertinent to a particular case.[117] Emphasis should be placed on whether the organization is a business or a commercial enterprise and whether its membership policies are so unselective and unrestricted that the organization can fairly be said to offer its services to the public.

The United States Supreme Court cases of *Roberts* and *Rotary Club of Duarte* illustrate application of the factors to cases in which the membership policies of the organizations prohibited admission of female applicants.[118] The court in *Roberts* found that two local chapters of the Jaycees, a nonprofit membership organization, lacked the characteristic of a distinctively private organization. In determining that Jaycees was neither small nor selective, the court considered that the two local chapters had 400 or more members; that apart from age and sex, they did not

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[115] *Dezell v. Day Island Yacht Club,* 796 F.2d 324, 329 (9th Cir.1986).

[116] *Roberts,* 468 U.S. at 620, 104 S.Ct. 3244.

[117] *Id; Rogers,* 636 F.Supp. at 1479 (citing *Kiwanis Int'l v. Ridgewood Kiwanis Club,* 627 F.Supp. 1381, 1388 (D.N.J.1986)).

[118] *Rotary Club of Duarte,* 481 U.S. at 537, 107 S.Ct. 1940; *Roberts,* 468 U.S. at 614, 104 S.Ct. 3244.

employ any criteria for judging applicants for membership; that members were routinely recruited and rarely denied membership; that although women were prohibited from voting and holding office, they attended meetings and participated in various organizational functions; and nonmembers of both genders regularly participated in activities, programs and recruitment meetings.[119]

Similarly, in *Rotary Club of Duarte* the Supreme Court concluded that Rotary membership practices lacked the selectiveness necessary to claim constitutional protection as an organization based upon a private, intimate relationship.[120] In determining that Rotary was public and not private in nature, the Court considered that club policy directed clubs to recruit a steady stream of prospects to offset attrition and to increase membership; that the purpose of Rotary was "'to produce an inclusive, not exclusive, membership,'" providing the club with a cross section of the business and professional community; that service projects were undertaken to improve the standards of members' businesses and professions; and that meetings and functions were generally open to nonmembers.[121]

In this case, in reaching its conclusion that the exemption under the WLAD was unambiguous and automatically exempted fraternal organizations, the Court of Appeals examined the nature of the Eagles organization.[122]

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[119] *Roberts,* 468 U.S. at 621, 104 S.Ct. 3244.

[120] *Rotary Club of Duarte,* 481 U.S. at 546, 107 S.Ct. 1940.

[121] *Id.* at 546-47, 107 S.Ct. 1940.

[122] *Fraternal Order of Eagles, Tenino Aerie No. 564,* 108 Wash.App. at 217, 27 P.3d 1254.

After considering the purpose, membership requirements, and operation of the Eagles, the court concluded the organization did not come within the ambit of the statutory definition of "public accommodation."[123] We do not agree with that conclusion.

Because this appeal arises from a trial court order granting summary judgment, this court reviews the order of summary judgment de novo, engaging in the same inquiry as the trial court, which is to consider all facts submitted in the record and reasonable inferences in a light most favorable to the nonmoving party.[124] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[125] For purposes of this appeal, we review the record before the trial court to determine whether it properly considered the interrelation between the "distinctly private" factors and established facts [126] to determine if there remains any issue of material fact on

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[123] *Id.* The Court of Appeals did note that the WLAD applied to the organization when it acts like a public accommodation (e.g., holding public dances or renting facilities for events).

[124] *Enter. Leasing, Inc. v. City of Tacoma,* 139 Wash.2d 546, 551, 988 P.2d 961 (1999); *Wilson v. Steinbach,* 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

[125] *Stokes v. Polley,* 145 Wash.2d 341, 346, 37 P.3d 1211 (2001); CR 56.

[126] " 'A material fact is one upon which the outcome of the litigation depends in whole or in part.' " *Samis Land Co. v. City of Soap Lake,* 143 Wash.2d 798, 803, 23 P.3d 477 (2001) (quoting *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.* 115 Wash.2d 506, 516, 799 P.2d 250 (1990)). The "distinctly private" factors serve as material facts because the outcome of the case relies on proving the factors favor one conclusion over the other.

the question whether the Eagles is a distinctly private organization.

In considering the purpose and selectivity of the Eagles, the trial court focused its examination on Respondents' actual practices by reviewing their literature to gain insight into membership programs and goals. The literature indicated that the Eagles support and undertake benevolent social causes and projects, and asks for membership participation in these service projects to better serve others and make their communities and countries better. The new member welcoming brochure concludes with the Eagles' slogan, "Every Member Owes at Least One New Member to His Aerie Each Year. A large membership makes it possible for us as a fraternity to give you so much for the small dues you pay." These results, the trial court concluded, undermine the contention that the Eagles is a selective social club only. Drawing inferences from these facts and arguments of counsel, the trial court concluded the Eagles was not selective in its membership practices and thus was not distinctly private.

The record indicates that the Eagles is a complex structure with distinct departments charged with particular responsibilities. The membership department has created recruitment and incentive programs to increase membership rolls.[127] To encourage membership growth, the Eagles recognize and give awards to local aeries and members for producing new members.

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[127] *See* Clerk's Papers at 759, 802-12.

The record reveals facts suggesting the Eagles' membership practices are selective. In order to become a member, the candidate must be proposed for membership by two current members in good standing.[128] In addition to personal sponsorship, the candidate must meet the following criteria: be a male person at least 21 years of age, be of good moral character, not be connected in any way with the Communist Party nor believe in the overthrow of government, and profess a belief in a Supreme Being.[129] Each prospective member is then interviewed and recommended by a local Aerie interviewing committee. Once recommended, a candidate for membership must be approved by a majority vote of members at an aerie meeting.

In a declaration by one of its officers, the Eagles claim they do not advertise or solicit membership at public functions.[130] Nevertheless, the trial court relied on a brochure published by Respondents and distributed for recruitment of new members to infer that the Eagles is "public" in nature.

Interpreting RCW 49.60.040(10) to unconditionally exempt groups merely designating themselves as "fraternal organizations" undermines the purpose of the WLAD to prevent and eliminate discrimination in all public settings. The WLAD should be interpreted in a manner consistent with legislative intent. Legislative intent is initially discerned from the purpose section which broadly

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[128] Clerk's Papers at 597, 928.

[129] *Id.* at 928.

[130] *Id.* at 596.

proscribes discrimination in settings open to the public.[131] The Legislature mandated not only a liberal interpretation of the WLAD, it also intended a liberal reading of what constitutes a "public accommodation."[132] In an attempt to define "public accommodation" the Legislature provided a list of public places in general nonexclusive terms. Reading the proviso in RCW 49.60.040(10) to exclude "fraternal organizations," without determining their public, private, or religious nature, is inconsistent with the purpose of the WLAD. It is thus consistent with legislative intent to interpret the statute to exclude organizations determined to be distinctly private from the purview of the WLAD.

On the entire record before us, we conclude the conclusions reached by the trial court on the summary judgment motions were not in error.

ATTORNEY FEES

Petitioners ask for reasonable attorney fees incurred in this appeal pursuant to RAP 18.1 and RCW 49.60.030(2). We conclude they are entitled to reasonable attorney fees, the amount to be determined by the Supreme Court Clerk.[133]

SUMMARY AND CONCLUSIONS

The Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, requires a "fraternal organization" to

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[131] RCW 49.60.010.

[132] *See* RCW 49.60.020, .040(10).

[133] RAP 18.1(j).

be "distinctly private" in order to qualify for exemption under RCW 49.60.040(10).

Because this appeal arises from a trial court order granting summary judgment, this court reviews the order of summary judgment de novo, engaging in the same inquiry as the trial court, which is to consider all facts submitted in the record and reasonable inferences in a light most favorable to the nonmoving party. Summary judgment is appropriate if there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Petitioners and Respondents agree there remains no genuine issue of material fact following the orders on summary judgment granted by the trial court.

Interpreting RCW 49.60.040(10) to unconditionally exempt groups merely identifying themselves as "fraternal organizations" undermines the purpose of the WLAD to prevent and eliminate discrimination in all public settings. It is consistent with legislative intent to interpret the statute to exclude distinctly private organizations from the purview of the WLAD.

Neither this court nor the Legislature has defined what constitutes a "distinctly private" club. However, the United States Supreme Court in *Roberts v. United States Jaycees* has announced a list of factors which courts may use in determining the status of an organization: (1) size, (2) purpose, (3) policies, (4) selectivity, (5) public services offered, (6) practices, and (7) other characteristics pertinent to a particular case. These factors were relevant considerations in this case.

We conclude from the record in this case that the trial court properly granted summary judgment after concluding

there remained no issue of material fact on the question whether the Fraternal Order of Eagles is a distinctly private organization and that Respondents Eagles are not entitled to exemption under the WLAD, RCW 49.60.040(10). The trial court was thus correct in concluding that Respondents Eagle may not discriminate on the basis of gender and must admit women into membership. We reverse the Court of Appeals, Division Two.

JOHNSON, *IRELAND*, BRIDGE, *OWENS*, JJ., and WEBSTER, J.P.T.

MADSEN, J. (concurring).

I agree with the majority that the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, requires a "fraternal organization" to be "distinctly private" in order to qualify for exemption under RCW 49.60.040(10). I further agree with the analysis concluding that the Fraternal Order of Eagles (Eagles) does not qualify for such exemption. I write separately, however, to address the Eagles' additional constitutional challenge that application of the WLAD to require the Eagles to admit women as members violates the current members' First Amendment rights to freely associate and to clarify that the "distinctly private" exemption in the WLAD simply embodies the constitutional standard set forth by the United States Supreme Court.

Before reaching the constitutional issue, the dissent takes the position that the WLAD is facially inapplicable to the membership policies of the Eagles calls for brief comment. In his dissent, Justice Sanders contends that membership in an organization is not a "place of public . . . accommodation" under RCW 49.60.040(10), and he admonishes the majority for "not even attempt[ing] 'to tie the

term "place" to a physical location.'" Dissent (Sanders, J.) at 677-678 (quoting *Boy Scouts of America v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 2456 n. 3, 147 L.Ed.2d 554 (2000)). The majority, however, is correct in holding that the WLAD's guarantee against discrimination because of race, creed, color, national origin, sex, or . . . disability applies to the Eagles as a "place of public resort, accommodation, assemblage, or amusement." RCW 49.60.030(1)(b). The definition of "place of public . . . accommodation" includes membership policies of groups who extend an open invitation to the public to "gather[ ], congregate[ ], and assemble[ ] for amusement, recreation, or public purposes." RCW 49.60.040(10). *See U.S. Jaycees v. McClure,* 305 N.W.2d 764 (Minn.1981); *Nat'l Org. for Women v. Little League Baseball, Inc.,* 127 N.J.Super. 522, 318 A.2d 33 (1974). *See also* Majority at 668 n.111.

The Minnesota and New Jersey Supreme Courts have recognized that "'place of public accommodation' or a 'facility' is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation." *McClure,* 305 N.W.2d at 773 (quoting (*Little League Baseball,* 127 N.J.Super. at 530-31, 318 A.2d 33)). The New Jersey Supreme Court held that membership in the Little League constitutes a "place of public accommodation" under New Jersey's Law Against Discrimination, N.J.STAT.A.N.N. § 10:5-5(*l*). *Little League Baseball,* 127 N.J.Super. at 531, 318 A.2d 33. The court explained that "[t]he statutory noun 'place' (of public accommodation) is a term of convenience, not of limitation," and the "place" of public accommodation is the ball field where the children play. *Id.* The "agglomeration of the arrangements which

Little League and its local chartered leagues . . . provide" constitute the statutory example of "'accommodations, advantages, facilities and privileges'" that are provided at these places of "public accommodation." *Id.*; N.J.STAT.A.N.N. §§ 10:5-5, 10:5-12(f).

Since Little League conducted its activities in public places and "the invitation [was] open to children in the community at large, with no restriction (other than sex)," Little League could not discriminate based on sex. *Little League Baseball,* 127 N.J.Super. at 531, 318 A.2d 33. Likewise, the Minnesota Supreme Court held the Jaycees as a "place of public accommodation" because the group did little screening for membership, other than sex, and did allow women to become associate members. *McClure,* 305 N.W.2d at 773. Thus, the Jaycees had an "open invitation to virtually anyone to become a dues paying individual or associate member." *Id.*

Likewise, as determined by the majority, the nonselectivity of the Eagles provides an "open invitation" to the public to become a dues paying member. The Eagles calls for widespread recruitment and a large membership base and even invites women to become Auxiliary members with use of the Eagles' facilities. The recruitment process specifically emphasizes a lack of selectivity on the part of the group, summed up in the Eagles' slogan, "Every Member OWES at Least One New Member to His Aerie Each Year[.] A large membership makes it possible for us as a Fraternity to give you so much for the small dues you pay." Majority at 670.

Moreover, the WLAD broadly defines "place of public . . . accommodation," and the legislature has directed that "[t]he provisions of [chapter 49.60 RCW] shall be construed

liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The WLAD's proscription against discrimination "includes, but is not limited to, any place . . . or *use of* any property or facilities," followed by a list of examples. RCW 49.60.040(10) (emphasis added). The "public place" definition, accordingly, includes application to fixed places or mobile sites occupied for public use. In this case, the "place[s] of public . . . accommodation" include the local Aerie facilities, the State Aerie's meeting place, as well as all the mobile sites where the Eagles meet for activities such as the National Convention, civic and charity events, and holiday celebrations. The Eagles' activities and events constitute the statutory examples of places "where the public gathers, congregates, or assembles for amusement, recreation, or public purposes." RCW 49.60.040(10).

In sum, the Eagles invites the public to its numerous meeting and activity venues which constitute "place[s] of public . . . accommodation" and render the WLAD applicable to prevent the Eagles from discriminating in its membership policies. RCW 49.60.030(1)(b), .040(10).

The majority correctly looks to federal case law in making its determination that the Eagles is not "distinctly private" to warrant exemption from the WLAD's requirements. Majority at 669-670. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 546, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); *Roberts v. U.S. Jaycees,* 468 U.S. 609, 620, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The majority analyzes the nature of the Eagles, whether public or private, by applying factors enumerated by the United States Supreme Court. *Roberts,* 468 U.S. at 620, 104 S.Ct. 3244 (noting relevant factors in determining whether a

relationship is intimate or attenuated of personal attachments include size, purpose, policies, selectivity, congeniality, and other characteristics that may be pertinent).

In *Roberts,* however, the United States Supreme Court set out these factors to aid in its determination of whether an organization has distinctive intimate characteristics that might afford it *constitutional* protection of the decision of its members to exclude women. *Id.* at 621, 104 S.Ct. 3244. The *Roberts* case addresses the long established right to intimate association, embodied in the Bill of Rights' security of individual liberty. *Id.* at 618, 104 S.Ct. 3244. The right to intimate association affords "the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* (citing *e.g., Pierce v. Soc'y of the Sisters of the Holy Names of Jesus. and Mary,* 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)). The protection of intimate relationships from undue intrusion by the State safeguards individual liberties. *Id.*

The WLAD's language specifically exempting "any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations" recognizes the constitutional right to intimate association afforded to such groups. RCW 49.60.040(10). The legislature exempts "distinctly private" groups from the WLAD's requirements because to apply the law to private entities constitutes undue intrusion by the State on the right to engage in intimate associations. When relationships lack an intimate nature, however, the concern of constitutional protection lessens. As the United States Supreme Court has stated:

> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Roberts, 468 U.S. at 620, 104 S.Ct. 3244. The majority holds that the Eagles are not "distinctly private." Put another way, the relationships among Eagles members are not so intimate as to afford the group constitutional protection in the decision of its members to exclude women.

Although the majority does not discuss it, the Eagles raise a second argument that the Court must address: whether the application of the WLAD to compel the Eagles to accept women unconstitutionally infringes on the group's freedom of expressive association. Freedom of expressive association has long been recognized as providing individuals the "right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts,* 468 U.S. at 618, 622, 104 S.Ct. 3244 (citing *e.g., NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 907-09, 932-33, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Larson v. Valente,* 456 U.S. 228, 244-46, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982); *In re Primus,* 436 U.S. 412, 426, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Abood v. Detroit Bd. of Education,* 431 U.S. 209, 231, 97 S.Ct. 1782, 1797, 52 L.Ed.2d 261 (1977)). The First Amendment rights could not be "vigorously protected from interference by the State unless a correlative freedom

to engage in group effort toward those ends were not also guaranteed." *Roberts,* 468 U.S. at 622, 104 S.Ct. 3244.

The Eagles pursue a wide variety of social, cultural, and religious ends. The group's stated purpose is to:

> Unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality. . . . To promote and raise funds for duly authorized Fraternal Order of Eagles charities and contribute to worthwhile charitable causes.

Clerk's Papers at 866. The activities and objectives of the Eagles implicate freedom of speech, assembly, and the exercise of religion. Thus, the WLAD's requirement that the Eagles admit women works as state interference with the group's organizational structure and affairs. *See Roberts,* 468 U.S. at 623, 104 S.Ct. 3244 (holding no clearer example of intrusion into the internal structure or affairs of a group than a regulation that forces the group to accept members it does not desire). The Court must determine whether requiring the Eagles to admit women may impair the members in their expression of viewpoints and endeavors.

The United States Supreme Court has announced the following test for determining whether State action violates the right of expressive association:

> Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts, 468 U.S. at 623, 104 S.Ct. 3244. Thus, the First Amendment right to expressive association is not without limits.

Washington certainly has a compelling interest in deterring and eradicating discrimination, and we have held the purpose of the WLAD as a policy of the highest order. *Allison v. Hous. Auth. of City of Seattle,* 118 Wash.2d 79, 86, 821 P.2d 34 (1991); *see also* Majority at 666-667 nn.90-91. Furthermore, the WLAD's goal of preventing and ending discrimination on the basis of "race, creed, color, national origin, sex, or . . . disability" in "place[s] of public . . . accommodation" does not relate to the suppression of ideas, nor does the WLAD impose any serious burden on the members' freedom of expressive association. RCW 49.60.030(1)(b), .040(10).

It is most persuasive that the Eagles opened membership to women from 1995-1998 and allowed all women admitted during that time period to retain their memberships after closing membership to women once again in 1998. The action exemplifies that the presence of women does not hinder the ability of the Eagles to engage in protected activities or to disseminate the groups' preferred views. The imposition of the WLAD to require the Eagles to admit women does not pose a change to the organization's stated purpose, *infra* p. 679; nor does it restrict the Eagles' ability to exclude individuals who do not support these stated ideologies. Furthermore, even if application of the WLAD infringes in some part on the Eagles' protected First Amendment rights, the WLAD's proscriptions are no greater than is necessary to accomplish Washington's compelling interest in eradicating discrimination.

For these reasons, I would hold that the Eagles members' right to expressive association is not violated by application of the WLAD to require the organization to admit women members.

JOHNSON, J., concurs.

ALEXANDER, C.J. (dissenting).

The majority indicates that the principal issue in this case is whether an organization must be "'distinctly private'" in addition to being "'fraternal,'" in order to be exempt from Washington's Law Against Discrimination (WLAD). Majority at 657. I agree that this is the central question before us. I also agree with the majority that "to unconditionally exempt groups merely identifying themselves as 'fraternal organizations' undermines the purpose of the WLAD." Majority at 671. In that regard, I am in accord with the trial court and disagree with the Court of Appeals and Justice Sanders's dissent. Where I differ with the majority is in its holding that there is no genuine issue of material fact on the issue of whether the Eagles is a "distinctly private" organization, and that petitioners are, therefore, entitled to judgment as a matter of law.

A grant of summary judgment is appropriate only when the submissions to the court show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "'A material fact is one upon which the outcome of the litigation depends in whole or in part.'" *Samis Land Co. v. City of Soap Lake,* 143 Wash.2d 798, 803, 23 P.3d 477 (2001) (citations omitted). On review of a summary judgment, the appellate court engages in the same inquiry as the trial court. *Harris v. Ski Park Farms, Inc.,* 120 Wash.2d 727, 737, 844 P.2d 1006 (1993) (citing *Marincovich v. Tarabochia,* 114

Wash.2d 271, 787 P.2d 562 (1990)). The court must consider the facts submitted and all reasonable inferences in the light most favorable to the nonmoving party and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Because the petitioners, the Tenino and Whidbey Island Aeries of the Fraternal Order of Eagles and the female members of the Tenino Aerie, prevailed on their motion for summary judgment, the Grand Aerie of the Fraternal Order of Eagles must be deemed the nonmoving party.

The Court of Appeals concluded that simply because the Fraternal Order of Eagles is a fraternal organization, it was "'distinctly private'" and, thus, "excluded" from the operation of WLAD in places of "'public accommodation.'" *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie, Fraternal Order of Eagles,* 108 Wash.App. 208, 217, 27 P.3d 1254 (2001). As noted above, I agree with the majority that this was error. I do not, however, believe that we should, as the majority does, reverse the Court of Appeals and reinstate the decision of the trial court. We should instead remand for a trial.

I believe this case must go to trial because the question of whether the Fraternal Order of Eagles is or is not a distinctly private organization is a factual question that cannot be resolved on the record before us. Summary judgment is, therefore, not appropriate. The majority buttresses its determination that the trial court properly granted summary judgment to petitioners by saying, "Petitioners and Respondents agree there remains no genuine issue of material fact following the orders on summary judgment granted by the trial court." Majority at 676. While the parties may agree on the supporting facts to be examined according to the criteria set forth in *Roberts v.*

United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), they most certainly do not agree on the inferences that may be drawn from these facts.

In concluding that the Eagles is not a distinctly private organization, the majority looks favorably on the facts the trial court focused on when it concluded that the Eagles is not a distinctly private organization. In that regard, the trial court indicated that the literature of the Fraternal Order of Eagles revealed that the Eagles support and undertake benevolent social causes and projects, and asks its members to participate in these projects in order to serve others and make the community and nation a better place. The record also indicates that the Eagles new member welcome brochure concludes with the statement, " 'Every Member *Owes* at Least One New Member to His Aerie Each Year[.]' . . . A large membership makes it possible for us as a Fraternity to give you so much for the small dues you pay." Clerk's Papers at 706. The submissions also show that to encourage membership, the Grand Aerie of the Fraternal Order of Eagles recognizes and gives awards to local Aeries and individual members for bringing in new members. These facts, according to the trial court, undermine the contention that the Eagles is a selective fraternal organization.

On the other hand, the submissions before the trial court reveal that the membership practices of the Eagles are somewhat selective. In order to become a member, a candidate must be proposed by two current members who are in good standing. In addition, the candidate for membership must be a male person and at least 21 years of age, of good moral character, not connected in any way with the Communist party nor believe in the overthrow of government. The candidate must also profess a belief in a

supreme being. Furthermore, each prospective member must be interviewed by an interviewing committee, which may or may not recommend the candidate for membership. Candidates who are recommended for membership gain membership only if their membership application receives a majority vote of the members of the Aerie in attendance at the meeting at which the membership application is considered. The Grand Aerie declared in a submission of one of its officers that the Eagles do not advertise or solicit members at public functions. Once an applicant for membership gains entry to the Eagles, he may attend lodge meetings at which ceremonies and prayers are performed in accordance with secret rituals.

In my view, reasonable minds could differ as to what inferences flow from the submissions presented to the trial court. While one can certainly mount a credible argument that the aforementioned facts are susceptible only to a conclusion that the Eagles is not a distinctly private organization, one can mount a reasonable argument contrary to that position. Indeed, respective counsel, though agreeing that the facts were not disputed, vehemently disagreed as to what conclusions could be drawn from these facts. In light of the fact that the record must be viewed most favorably to the Grand Aerie of the Fraternal Order of Eagles, all reasonable inferences must favor its position that the Eagles is a distinctly private fraternal order. The factual issue of whether the Eagles is or is not a distinctly private fraternal organization was, therefore, not properly determined on summary judgment.

In sum, after reviewing all facts in the record, and drawing reasonable inferences in a light most favorable to the nonmoving party, the Grand Aerie of the Fraternal Order of Eagles, I conclude that there remains a genuine

issue of material fact that can be resolved only by the trial judge or a jury after a trial. At a trial the focus should be on the factors the United States Supreme Court identified in *Roberts,* 468 U.S. 609, 104 S.Ct. 3244, in determining if the Fraternal Order of Eagles has the characteristics of that distinctly private organization. I would, therefore, remand the case to the trial court for that determination. Because the majority does otherwise, I dissent.

SANDERS, J. (dissenting).

The legal questions are whether the sexually discriminatory membership criteria of the Fraternal Order of Eagles is covered by Washington's law against discrimination (WLAD) pursuant to RCW 49.60.040(10) as a "place" of public accommodation and, if so, whether the Eagles is exempt from that statute as a fraternal organization.

If the statute is unambiguous, its meaning must be derived solely from the statutory language. *In re Pers. Restraint of Lehman,* 93 Wash.2d 25, 27, 604 P.2d 948 (1980). Resort to other tools of statutory construction, including consideration of legislative history, is improper. *Cherry v. Muni. of Metro. Seattle,* 116 Wash.2d 794, 799, 808 P.2d 746 (1991). "[W]hen the language of a statute is plain and free from ambiguity, it must be held to mean exactly what it says." *Shelton Hotel Co. v. Bates,* 4 Wash.2d 498, 507, 104 P.2d 478 (1940). Put differently, when the statute is unambiguous the statute speaks for itself. *See Parkhurst v. City of Everett,* 51 Wash.2d 292, 294, 318 P.2d 327 (1957) ("If the words employed in the declaring part of a statute be plain, unambiguous, and well understood according to their natural and ordinary sense and meaning, the statute furnishes a rule of construction

beyond which a court cannot go.") (citing *Tsutakawa v. Kumamoto,* 53 Wash. 231, 101 P. 869, 102 P. 766 (1909)).

WLAD, chapter 49.60 RCW, guarantees the right to be free from discrimination because of sex in "any place of public . . . accommodation." RCW 49.60.030(1)(b). *See also* RCW 49.60.215 (making it an unfair practice to refuse admission into places of public accommodation on the basis of sex). RCW 49.60.040(10) defines the phrase "any place of public . . . accommodation" as:

> [A]ny *place,* licensed or unlicensed, . . . where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, . . . or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, . . . where the public gathers, congregates, or assembles for amusement, recreation, or public purposes. . . . PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter.

RCW 49.60.040(10) (emphasis added).

I posit the policy of the Eagles, which limits eligible membership to males of good moral character, not connected or affiliated with the Communist Party, not believing in the overthrow of the government, recommended by two preexisting members, and accepted by the existing members, does not violate this statute and, even if it did,

the Eagles' First Amendment right of free association might well be violated.

Membership Criteria are not a Place

This statute is facially inapplicable to Eagles membership policies because the Eagles is not a "place." Our past decisions concerning a "place of public accommodation" suggest WLAD applies only to admission into physical places that constitute places of public accommodation, such as barber shops, *In re Johnson,* 71 Wash.2d 245, 252, 427 P.2d 968 (1967); *cf. Browning v. Slenderella Sys. of Seattle,* 54 Wash.2d 440, 445, 341 P.2d 859 (1959) (concluding a salon is a place of public accommodation as defined by the public accommodation law, RCW 9.91.010), *overruled in part on other grounds by Nord v. Shoreline Sav. Ass'n,* 116 Wash.2d 477, 805 P.2d 800 (1991), the facilities of public transit authorities, *Fell v. Spokane Transit Auth.,* 128 Wash.2d 618, 638, 911 P.2d 1319 (1996), parks and public resorts, *see Davis v. Tacoma Ry. & Power Co.,* 35 Wash. 203, 204, 207, 77 P. 209 (1904), and movie theaters, *see Anderson v. Pantages Theatre Co.,* 114 Wash. 24, 27-28, 194 P. 813 (1921), *Randall v. Cowlitz Amusements,* 194 Wash. 82, 84, 76 P.2d 1017 (1938). The definition of "any place of public . . . accommodation" in RCW 49.60.040(10) does not fit admission to the *membership* of an organization. The majority does not even attempt "to tie the term 'place' to a physical location." *Cf. Boy Scouts of Am. v. Dale,* 530 U.S. 640, 657, 120 S.Ct. 2446, 2456, 147 L.Ed.2d 554, *id.* at n. 3, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

Nevertheless the majority asserts, without analysis, "the WLAD reaches the membership policies of organizations."

Majority at 668. RCW 49.60.040(10) defines which physical locations constitute "[a] place of public . . . accommodation" to which persons must be allowed access without consideration of sex, race, nationality, etc. *See* RCW 49.60.040(10); .030(1)(b); .215. That definition includes "any place, licensed or unlicensed" and provides an extensive list of such places. RCW 49.60.040(10). It lists various examples of physical locales such as facilities for entertainment, housing, health services, or the sale of goods or rendering of personal services, stations, terminals and garages, halls, elevators, washrooms, educational institutions, and schools. *Id.* Although the definition does embrace facilities "where the public gathers, congregates, or assembles for amusement, recreation, or public purposes," not once does it refer to membership of any organization gathering, congregating, or assembling in such facilities. In short, the WLAD concerns the right to admission into *places* of public accommodation, not admission into the *membership* of any organization operating a place of public accommodation. *See Fell,* 128 Wash.2d at 638, 911 P.2d 1319 (noting RCW 49.60.040(10) embraces only admission into "*places and facilities*") (emphasis added).

Fraternal Organizations are Exempt from its Scope

Even if membership practices are a "place," the statute expressly exempts "fraternal organizations" from its scope. Although all concede the Fraternal Order of Eagles is a "fraternal organization," the majority conjures an ambiguity, *see* majority at 664-665 (concluding RCW 49.60.040(10) is ambiguous), and then construes the statute to reach its desired result.

At the outset I disagree with the majority's conclusion this statute is ambiguous for the reasons articulated by the Court of Appeals.

> First, we note that "fraternal organizations" is set apart from "institute," "club," and "place of accommodation" within the statute. It is plain that this list of three nouns (i.e., "institute, club, or place") is intended to be read together because they are connected by the word "or," which is a function word indicating that they are alternatives to each other. Thus, the three nouns are connected by some common idea.
>
> Second, "fraternal organizations" is set apart from the three nouns by the adjective clause (also known as a "relative clause"): "which is by its nature distinctly private." Adjective clauses are to immediately follow the noun or nouns that they modify.
>
> The reason for this rule is so that it will be clear what is being modified. Clearly, the series of nouns ("institute, club, or place") are modified by this adjective clause and "fraternal organizations" is not. By this sentence construction we can clearly understand what the common idea is that connects those three entities together – a nature that *may* be "distinctly private." That is to say, these entities either fit within the definition of being "distinctly private" or they are "public." Plainly, "fraternal organizations" is not modified by this adjective clause. *It would have been a simple task for the legislature to include "fraternal organizations" in its list and it did not.*

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie, Fraternal Order of Eagles, 108 Wash.App. 208, 216-17, 27 P.3d 1254 (2001), *review granted,* 145 Wash.2d 1033,

43 P.3d 20 (2002) (citations omitted) (emphasis added). This analysis is faithful to the plain text of the statute.

The Court of Appeals continued:

> [Petitioners assert] that the word "including" brings "fraternal organizations" within the list of the three nouns. But, read in the context of the statute, "including" is a synonym for the word "and." "Including" brings "fraternal organizations" within the list separated by the adjective clause. By use of this language, the legislature already determined that fraternal organizations are, by their very nature, "distinctly private."
>
> We conclude that fraternal organizations are automatically excluded from the statute's operation. . . . But for those limited occasions when the organization acts like a public accommodation (e.g., serving lunches, holding public dances, or renting facilities for events), the legislature has provided that it shall be "covered by this chapter." RCW 49.60.040(10) ("though where public use is permitted that use shall be covered by this chapter"). Therefore, there is no need for FOE to prove it is "distinctly private"; fraternal organizations do not come within the ambit of "public accommodations." The statute is unambiguous; this proviso exempts fraternal organizations from the statute's application without having to examine whether they are "distinctly private."
>
> The trial court erred. . . . *Fraternal Order of Eagles,* 108 Wash.App. at 217, 27 P.3d 1254 (footnote omitted). Again, I agree.

Since petitioners do not dispute the Fraternal Order of Eagles is in fact a fraternal organization, that should end the case.

In summary, the membership policies of the Eagles are not covered by this statute, and, even if they were generally within the statutory scope, the Eagles is exempt from coverage of the WLAD as a matter of law. I would therefore hold the trial court erred when it (1) denied the Eagles' motion to dismiss and (2) granted petitioners' motion to impose liability.

Distinctly Private

Unfortunately, instead of abiding by the plain language of RCW 49.60.040(10) the majority accepts the trial court's conclusion that "club" and "fraternal organizations" are the same. Majority at 664. The majority's construction, equating "fraternal organizations" with "club" and then requiring fraternal organizations to establish they are "distinctly private" to qualify for the exemption, violates at least three canons of construction.

First, "[w]hen the Legislature uses different words in the same statute, it usually means it intended the words to have different meanings." *State v. Keller,* 143 Wash.2d 267, 278, 19 P.3d 1030 (2001), *cert. denied,* 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). Although the inclusion of different words does not always mean they have different meanings, *see id.* at 278-79, 19 P.3d 1030, the majority opinion does not explain why the legislature included both "club" and "fraternal organizations" in the text if the two were intended to mean the same. Moreover, the majority does not explain why the legislature placed the two words in different locations. While the word "club" is listed in conjunction with two other forms of organizations, "fraternal organizations" is located separately and

alienated from the others by the clause "which is by its nature distinctly private."

The majority's conclusion "club" and "fraternal organizations" are the same is primarily based on the similarities in their alternative dictionary definitions. But comparison of these definitions conveniently omits the differences. A more complete dictionary definition of "club" is as follows:

> **club** . . . **2 b** (1): an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usu. jointly supported and meeting periodically, membership in social clubs usu. being conferred by ballot and carrying the privilege of use of the club property . . . **c** *obs*: a set or group of persons having common opinions or aims . . . **e**: a commercial establishment serving food and liquor and often featuring music, dancing, or other entertainment: NIGHTCLUB . . . **f**: an amateur or professional athletic organization devoted to a particular sport[.]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 430 (1986). Thus, while "an association of persons organized for a common object or purpose" may be *a* definition of "club," majority at 664, it is not the *only* definition. The shortcomings of the majority opinion become even more apparent when one compares the above definition to a more complete dictionary definition of "fraternal" and "fraternity":

> **fra.ter.nal** . . . **1 a**: of, relating to, or involving brothers . . . **b**: of, relating to, or being a fraternity or confederation <a order> . . . **c**: of, relating to, or being one of many men's or sometimes women's clubs or associations usu. having secret

> rites, restricted memberships, and religious, social, charitable, or professional purposes[.]
>
> **fra.ter.ni.ty** . . . **1**: a group of people associated or formally organized for a common purpose, interest, or pleasure: as **a**: a religious or ecclesiastical brotherhood **b**: a usu. organized group of men of the same class, occupation, interest, or purpose : COMPANY, GUILD : fraternal order[.]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 903 (1986). A fraternal organization may be a *type of* club; one usually having secret rituals, restricted membership, etc. "Club" is broader than "fraternal organizations," the former encompassing the latter.

Second, statutes must be construed so as not to render any language superfluous. *Fray v. Spokane County,* 134 Wash.2d 637, 648, 952 P.2d 601 (1998). If "fraternal organizations" means the same as "club," then the phrase "including fraternal organizations" would be redundant. Therefore, to avoid redundancy we must begin with the assumption the two terms are *not* the same.[1]

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[1] Courts may add or subtract provisions only when it is "certain that the legislature could not possibly have intended the words to be in the statute, and that the rejection of them serves merely as a correction of careless language and actually gives the true intention of the legislature." *Applied Indus. Materials Corp. v. Melton,* 74 Wash.App. 73, 78 n. 11, 872 P.2d 87 (1994). Here we have no evidence suggesting inclusion of the phrase "including fraternal organizations" in RCW 49.60.040(10) was the result of careless drafting on the part of the legislature. Nor is there any other concrete evidence to suggest that phrase is unnecessary. *Cf. Wash. Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 859, 774 P.2d 1199, 779 P.2d 697 (1989) (suggesting statutory phrases may be ignored when they are "mere surplusage").

Third, *Keller* reaffirmed that our starting point is to "assume the Legislature means exactly what it says." 143 Wash.2d at 276, 19 P.3d 1030. Here, however, the majority's conclusion that fraternal organizations must establish their distinctly private nature to qualify for an exemption assumes the legislature meant something *other than* what it said.

The majority claims RCW 49.60.040(10) is ambiguous because it is ineptly worded and enforcement of its plain language would lead to an illogical result: that some groups organized for a common purpose would be exempt only if they can show they are distinctly private whereas other groups organized for a common purpose would not be so required. Majority at 663, 665 (" 'The spirit or purpose of an enactment should prevail over . . . express but inept wording' ") (citing *State v. Day,* 96 Wash.2d 646, 648, 638 P.2d 546 (1981)). I disagree. A statute is not ineptly worded merely because a judge personally disagrees with the result it dictates. There is no need for such organizations to present evidence of their distinctly private nature to qualify for the exemption. The Court of Appeals also noted, "the legislature already determined that fraternal organizations are, by their very nature, 'distinctly private,' " if such characterization indeed be necessary. *Fraternal Order of Eagles,* 108 Wash.App. at 217, 27 P.3d 1254.

The majority also claims RCW 49.60.040(10) must be judicially rewritten because enforcing it as written would lead to a politically incorrect result. *See* majority at 665. But the personal views of judges about the Eagles' all-male membership policy are not relevant to determine whether the statutory definition of "any place of public . . . accommodation" is ambiguous. Not only is the WLAD not directed against unpleasantness per se, *Kahn v. Salerno,* 90

Wash.App. 110, 118, 951 P.2d 321 (1998), but the ambiguity of a statute is distinct from its political consequences. The test to determine whether a statute is ambiguous looks to the text and asks whether it can be subjected to two or more reasonable interpretations. *State v. McGee,* 122 Wash.2d 783, 787, 864 P.2d 912 (1993).

The majority's suggestion that enforcing RCW 49.60.040(10) as written would lead organizations to designate themselves as fraternal so they might freely discriminate assumes self-designation ends the inquiry. *See* majority at 671. However whether an organization qualifies as a fraternal organization is a judicial question to be resolved on the facts of the case. I therefore agree with the majority that merely *designating* an organization as a fraternal organization by creative naming is insufficient to escape requirements of the WLAD which are otherwise applicable. *See* majority at 671. The proper focus is on the realities of the organization. If an organization operates as a fraternal organization, we call it what it is: a fraternal organization. Moreover, to the extent fraternal organizations allow their facilities to be used by the general public, that use *is* covered by the WLAD. *See* RCW 49.60.040(10) ("though where public use is permitted that use shall be covered by this chapter").

Last, even if RCW 49.60.040(10) could be construed to exempt fraternal organizations only if proved to be "distinctly private," the Fraternal Order of Eagles *is* just that. "Distinctly private" is not defined in the statute. "In the absence of a statutory definition, we will give the term its plain and ordinary meaning ascertained from a standard dictionary." *State v. Sullivan,* 143 Wash.2d 162, 175, 19 P.3d 1012 (2001) (footnote omitted); *cf.* majority at 663.

The dictionary definition of "private" is:

> **pri.vate** . . . *apart from the state,* deprived of office, of or belonging to oneself . . . **1 a**: intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public[.]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1986) (emphasis added). The Fraternal Order of Eagles is certainly separate from the state, and its membership is limited to a particular group of persons. In fact, that is the objection! Thus, even under the majority's reading of RCW 49.60.040(10), the Fraternal Order of Eagles is exempt.

Roberts Factors

Although this is a case of first impression requiring us to determine the meaning of a state statute and then apply it accordingly, I find the majority's citation to United States Supreme Court cases discussing the First Amendment right of association mystifying and inaccurate.

For example, the majority states,

> Within this context, the Supreme Court in *Roberts v. United States Jaycees* [468 U.S. 609, 620, 104 S.Ct. 3244, 3251, 82 L.Ed.2d 462 (1984)] announced a list of factors to serve as a framework for distinguishing "private organizations" from "public accommodations." The factors include size, purpose, policies, selectivity, congeniality, and other characteristics pertinent to the particular case.

Majority at 668-669. Noticeably the majority encloses the words "private organizations" and "public accommodations" within quotations marks to seemingly suggest it is actually quoting from that portion of the *Roberts* opinion which enumerates various factors to be considered for this purpose. In point of fact, however, the text does not seek to distinguish between "private organizations" and "public accommodations" but rather presents a spectrum of personal associations between the poles of family relationships at one extreme and large business enterprises at the other, suggesting the First Amendment right of free association is more applicable to the former than the latter. All of these associations are, however, distinctly private, and there is no assertion in the opinion to the contrary.

The majority opinion is also remarkable for its failure to cite the most recent United States Supreme Court case culminating this line of authority: *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). There the United States Supreme Court found First Amendment associational protection prevailed over the New Jersey statute which prohibited discrimination on the basis of sexual orientation. Although this was a five to four decision with multiple opinions, there is nothing in any of them to suggest that any of the so-called *Roberts* factors involving the size of the organization (about one million American Boy Scouts in 1992), as well as its practice of public recruitment and liberal standards for membership admission, in any way diminished its First Amendment associational claim of the Scouts.

I posit these federal cases have nothing to do with a proper understanding of our state statute but, even if they did, they lend no support to the majority's claim that

Eagles is not "distinctly private." Nor do I find the majority's analysis on this point compelling, or even present. In point of fact, the majority, while sustaining this summary judgment, concludes "[t]he record reveals facts suggesting the Eagles' membership practices are selective." Majority at 670. If selectivity is a criteria, is not evidence of selectivity evidence this criteria has been met rendering summary judgment improper? I must ask, what is it, in particular, about the Eagles which, in the view of the majority, requires this private association be classified "public" as a matter of law? Enquiring minds want to know.

The majority's discussion of the First Amendment associational cases (particularly when supplemented with the recognition of the Boy Scouts case) does, however, highlight the significant constitutional question of whether application of Washington's Law Against Discrimination to the membership practices of the Eagles violates their First Amendment right to freely associate. That, I suppose, may be the next case; however, suffice to say the majority's strained statutory construction has created a constitutional problem which would be completely avoided were the result otherwise. This approach is inconsistent with the rule that we must construe statutes in a constitutional fashion where reasonably possible to do so, *State v. Rohrich,* 132 Wash.2d 472, 476, 939 P.2d 697 (1997).

The Court of Appeals correctly held the WLAD exempts fraternal organizations without any further requirement to show they are "distinctly private," even assuming their membership practices are within the scope of the act at all. *Fraternal Order of Eagles,* 108 Wash.App. at 217, 27 P.3d 1254. Moreover, and in any event, the

Fraternal Order of Eagles is, in fact, distinctly private. I dissent.

27 P.3d 1254

Court of Appeals of Washington,
Division 2.

FRATERNAL ORDER OF EAGLES, **TENINO** AERIE NO. 564; Kathleen L. Connor; Lanette Davis; Julia A. Foster; Gayle L. Hartman; Kaycee L. Johnson; Annette M. Riley; Diane E. Roberts; Janet Tresenriter; Alice F. Vassar; and Whidbey Island Aerie No. 3418, Respondents,

v.

GRAND AERIE, FRATERNAL ORDER OF EAGLES and Washington State Aerie, Fraternal Order of Eagles; Washington State Aerie, Appellants.

No. 25864-1-II.*

Aug. 3, 2001.

John Warner Widell, Hall Zanzig Widell PLLC, Seattle, Howard Terry Hall, Wolfstone Panchot & Bloch PS, Seattle, for Appellant.

Rosemary Daszkiewicz, Marlyn Kathryn Hawkins, Cairncross & Hempelmann PS, Seattle, for Respondents.

Bruce Edward Humble Johnson, Jeffrey L. Fisher, Davis Wright Tremaine, Seattle, for Amicus Curiae Conpor.

BRIDGEWATER, J.

The Grand Aerie of the Fraternal Order of Eagles (FOE), together with the Washington State FOE, appeals the trial court's grant of summary judgment in favor of

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* Editor's Note: The Official Washington Appellate Reports parallel citation and star pagination was not availaable [sic].

FOE's chapter in Tenino, Washington. The trial court ruled that FOE's refusal to admit new female members violated Washington's law against discrimination, chapter 49.60 RCW. We hold that a plain reading of this statute exempts fraternal organizations from its application except when such organizations permit public use. We reverse, including the award of attorney fees, and remand for entry of summary judgment in favor of the Grand Aerie.

History, Purpose, and Organizational Structure

Established in 1898, FOE now has 1.6 million members. There are approximately 66,000 members in Washington belonging to 106 chapters, or "Local Aeries." FOE is a nonprofit organization.[1] All Aeries are privately funded.

FOE's purpose is to "unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality[.]" CP at 644. FOE engages in activities designed to promote fraternity, charity, community, friendship and civic responsibility.

The Grand Aerie is FOE's governing body and establishes organizational policy. Every Local Aerie must adopt FOE's constitution.

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[1] The Internal Revenue Service recognizes FOE "as exempt from Federal Income Tax under section 501(c)(10) of the Internal Revenue Code[.]" Clerk's Papers (CP) at 612.

The Grand Aerie strictly maintains that FOE is not a civic or business group. According to the Grand Aerie, FOE does not promote its members' business or economic interests, no outside business may be conducted at Aerie meetings, and it does not offer training or opportunities for its members to develop business skills or contacts.

Membership Requirements

Although FOE constantly seeks to increase its membership, the Grand Aerie restricts who may become an Aerie member:

> No person shall be eligible to be elected to membership . . . unless such person is a male, is of good moral character, and believes in the existence of a Supreme Being, is not a member of any other Local Aerie of the [FOE], and unless he is over twenty-one (21) years of age[.]

CP at 669. In addition, prospective members must not belong to the Communist party or advocate the violent overthrow of the government.

To join a Local Aerie, an individual must be sponsored by two current members in good standing of that Aerie. The Grand Aerie claims that members may not sponsor an individual unless they believe he would be a good friend and fraternal brother.

After being nominated, applicants must be interviewed and recommended by the interviewing committee of the Local Aerie they seek to join. If an applicant is recommended, the members then vote to admit or reject him.

Policy on Female Aerie Members

FOE has a long history of excluding women from membership in Aeries. Instead, each Local Aerie has a corresponding Auxiliary that admits only women. But in 1995, the Grand Tribunal, FOE's judicial body, issued Opinion 750 that reversed the males-only Aerie membership policy. Soon after Opinion 750 was issued, several Local Aeries, including the Tenino, Washington Aerie (Tenino Aerie), began to admit female members.

The Grand Aerie withdrew Opinion 750 during its 1998 convention, thereby reinstating the males-only Aerie membership policy. The Grand Aerie, however, did not revoke the membership of women who became Local Aerie members before Opinion 750 was withdrawn. These women continue to be treated as full Aerie members by the Grand Aerie. The Tenino Aerie currently has 721 members, including 56 women.

According to FOE's constitution, any Aerie member may attend the meeting of another Aerie in a non-voting capacity. Female Aerie members (as opposed to Auxiliary members) must be welcomed at every other Local Aerie's meetings, regardless of whether that particular Aerie has chosen to admit women.

Rituals

Local Aeries hold twice-monthly meetings at which FOE's rituals are performed. Only Aerie members may attend such meetings. Only Aerie members know these rituals.

Aeries practice their rituals extensively. Ritual competitions are an important part of state, regional, and national

FOE gatherings. The Grand Aerie claims that the rituals "are the essence of membership in the [FOE]"[2] and would be rendered meaningless if not performed among men who value the "unique bond among a group of male friends who share a belief in a Supreme Being." Br. of Appellant at 10. Female members of the Tenino Aerie attend its meetings and also participate in its rituals.

Nonmembers and FOE

Although Aerie facilities are not open to the public, there are several ways that non-members of either sex can use the facilities. Every Local Aerie has a provision allowing Aerie and Auxiliary members to bring guests into its club or social room. Local Aeries sometimes rent unused rooms for weddings and similar events. In Washington, some Local Aeries serve lunch to anyone willing to pay; some also hold public dances.

FOE includes non-members, of both sexes, in many of its activities. Both male and female non-members attend its national convention. FOE works closely with male and female non-members through its various humanitarian, civic, and patriotic programs. Local Aeries carry out weekly or monthly suppers, evening entertainment, holiday activities, and civic events. Some of these events are for the members and their families and guests, other events are open to the public. FOE works with area youth, sponsors floats in parades, and honors non-member fire fighters and police officers.

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[2] CP at 598-99.

I. Washington's Law Against Discrimination

Washington's law against discrimination ("WLAD" or "the statute") recognizes the "right to be free from discrimination because of race, creed, color, national origin, [and] sex"[3] as a "civil right." RCW 49.60.030(1). Its purpose is to "deter and eradicate discrimination in Washington." *Marquis v. City of Spokane,* 130 Wash.2d 97, 109, 922 P.2d 43 (1996). Its provisions are to be liberally construed[4] to accomplish this purpose and its exceptions "narrowly confined." *Phillips v. City of Seattle,* 111 Wash.2d 903, 908, 766 P.2d 1099 (1989).

WLAD specifically prohibits discrimination in "public accommodation,"[5] broadly defined as:

> [A]ny place, licensed or unlicensed . . . where charges are made for admission, service, occupancy, or use of any property or facilities, . . . or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services . . . or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge . . . or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes[.]

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[3] "Sex" is defined as "gender." RCW 49.60.040(14).

[4] RCW 49.60.020

[5] RCW 49.60.030(1)(b); RCW 49.60.215.

RCW 49.60.040(10). The Legislature included a proviso in WLAD's public accommodation arm, which states:

> [N]othing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution[.]
>
> RCW 49.60.040(10).

II. Statutory Interpretation

We review de novo the meaning of a statute, with the primary purpose of giving effect to legislative intent. *State v. Kuhn,* 74 Wash.App. 787, 790, 875 P.2d 1225 (1994), *review denied,* 127 Wash.2d 1017, 904 P.2d 299 (1995).

The trial court interpreted WLAD's language to exempt only groups that are distinctly private in nature, then it determined that FOE was not distinctly private. The trial court construed WLAD's public accommodation provisions to require FOE to admit women.

The Grand Aerie argues that WLAD's plain, unambiguous language expressly exempts fraternal organizations (i.e., FOE is exempt because it is a fraternal organization). The Tenino Aerie does not dispute that FOE is a "fraternal organization." But it maintains that there is a requirement that FOE's nature be distinctly private before an

exemption is granted, just as there must be for an "institute," a "bona fide club," or a "place of accommodation."

The goal when construing a statute is to carry out the legislature's intent. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash.2d 1, 6, 721 P.2d 1 (1986). A statute is not ambiguous simply because arguments regarding distinct interpretations of it are conceivable. *See In re Riley*, 122 Wash.2d 772, 782, 863 P.2d 554 (1993); *Armstrong v. Safeco Ins. Co.*, 111 Wash.2d 784, 790-91, 765 P.2d 276 (1988). When determining the intent underlying a statute, a court must interpret the language at issue in the context of the entire statute. *In re Sehome Park Care Ctr., Inc.*, 127 Wash.2d 774, 778, 903 P.2d 443 (1995). Strained or unrealistic interpretations should be avoided. *Bour v. Johnson*, 122 Wash.2d 829, 835, 864 P.2d 380 (1993). Statutes should be interpreted "so as not to render any language superfluous." *Fray v. Spokane County*, 134 Wash.2d 637, 648, 952 P.2d 601 (1998).

The Tenino Aerie suggests that we look to the punctuation of the proviso and to rules of grammatical construction. We agree that this is the correct methodology.[6]

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[6] *See Lake County v. Rollins*, 130 U.S. 662, 670, 9 S.Ct. 651, 32 L.Ed. 1060 (1889) ("To get at the thought or meaning expressed in a statute . . . the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them."); *Estate of Telfer v. County Comm'rs*, 71 Wash.App. 833, 836, 862 P.2d 637 (1993) (applying principles of statutory construction and "normal rules of grammar" to interpret a statute), *review denied*, 123 Wash.2d 1028, 877 P.2d 695 (1994); SUTHERLAND STAT. CONSTR. § 47:15 at 264 (6th ed.2000) ("an act should be read as punctuated unless there is some other reason to do otherwise"); *see also U.S. v. Goldenberg*, 168 U.S. 95, 103, 18 S.Ct. 3, 42 L.Ed. 394 (1897) (lawmakers are "presumed to know the . . . rules

(Continued on following page)

The proviso provides: "[N]othing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations[.]" RCW 49.60.040(10). We also agree that there are two broad categories of groups that are given exemptions: those with a religious basis (i.e., educational facilities, columbariums, crematories, mausoleums, and cemeteries) and those that do not have a religious basis (i.e., institutes, clubs, places of accommodation, and fraternal organizations). *See* RCW 49.60.040(10).

The Tenino Aerie paints with a broad brush and calls the non-religious category "the private entity exception," thus, automatically assuming that all entities listed in that category must prove that they are "distinctly private." We examine this phrase to determine if the legislative intent can be so ascertained.

First, we note that "fraternal organizations" is set apart from "institute," "club," and "place of accommodation" within the statute. It is plain that this list of three nouns (i.e., "institute, club, or place") is intended to be read together because they are connected by the word "or," which is a function word indicating that they are alternatives to each other. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (1969) (stating that "or" is used as a function word to indicate alternatives

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of grammar"); *State ex rel. McDonald v. Whatcom County*, 92 Wash.2d 35, 39-40, 593 P.2d 546 (1979) (C.J., Utter dissenting) (finding a statute unambiguous by reading it to understand its intent and following standard rules of grammar).

between different things). Thus, the three nouns are connected by some common idea.

Second, "fraternal organizations" is set apart from the three nouns by the adjective clause (also known as a "relative clause"): "which is by its nature distinctly private." Adjective clauses are to immediately follow the noun or nouns that they modify. *See Caughey v. Employment Sec. Dep't,* 81 Wash.2d 597, 602, 503 P.2d 460 (1972) ("[W]here no contrary intention appears in a statute, relative and qualifying words and phrases refer to the last antecedent."); *Lakeside Country Day School v. King County,* 179 Wash. 588, 591, 38 P.2d 264 (1934) ("'It is a rule of law as old as the law itself, that a relative clause shall be construed to relate to the nearest antecedent that will make sense.'" (quoting *State ex rel. Peck v. Anderson,* 92 Mont. 298, 13 P.2d 231, 233 (1932))); *Casco Co. v. Olympia,* 124 Wash. 218, 222, 213 P. 915 (1923) ("The general rule that a proviso is deemed to apply only to the immediately preceding clauses or provisions in the section in which it is found is subject to many exceptions. It is always a question of legislative intent[.]").

The reason for this rule is so that it will be clear what is being modified. Clearly, the series of nouns ("institute, club, or place") are modified by this adjective clause and "fraternal organizations" is not. By this sentence construction we can clearly understand what the common idea is that connects those three entities together – a nature that *may* be "distinctly private." That is to say, these entities either fit within the definition of being "distinctly private" or they are "public." Plainly, "fraternal organizations" is not modified by this adjective clause. It would have been a simple task for the legislature to include "fraternal organizations" in its list and it did not.

The Tenino Aerie asserts that the word "including" brings "fraternal organizations" within the list of the three nouns. But, read in the context of the statute, "including" is a synonym for the word "and."[7] "Including" brings "fraternal organizations" within the list separated by the adjective clause. By use of this language, the legislature already determined that fraternal organizations are, by their very nature, "distinctly private."

We conclude that fraternal organizations are automatically excluded from the statute's operation. Our conclusion is further buttressed by examining the broad list of what is included in "public accommodations." We have extensively set forth FOE's purpose, membership requirements, and operation, and none of those aims, operations, or goals come within the ambit of the legislature's definition of "public accommodations" in the statute. But for those limited occasions when the organization acts like a public accommodation (e.g., serving lunches, holding public dances, or renting facilities for events), the legislature has provided that it shall be "covered by this chapter." RCW 49.60.040(10) ("though where public use is permitted that use shall be covered by this chapter"). Therefore, there is no need for FOE to prove it is "distinctly private"; fraternal organizations do not come within the ambit of "public accommodations." The statute is unambiguous; this proviso exempts fraternal organizations from the

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[7] *Cf. Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d 349, 359, 20 P.3d 921 (2001) (the word "includes" is a "term of enlargement"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1143 (1969) (defining "include" to mean "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle").

statute's application without having to examine whether they are "distinctly private."

The trial court erred. Because we have decided this case based upon the statute, we do not address the parties' constitutional arguments.[8] FURTHER, BECAUSE Foe is exempt undER wlad the respondeNTS have Not prevailed and are not entitled to attorney fees either for trial or for this appeal. RCW 49.60.030(2) (WLAD awards attorney fees to prevailing plaintiffs).

Reversed and remanded for entry of summary judgment in favor of Grand Aerie of the Fraternal Order of Eagles and the Fraternal Order of Eagles.

We concur: SEINFELD, P.J., and QUINN-BRINTNALL, J.

[8] The Tenino Aerie brought this action solely under the WLAD.

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNOR; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE M. RILEY; DIANE E. ROBERTS; JANET TRESENRITER; ALICE F. VASSAR, and WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, v. GRAND AERIE, FRATERNAL ORDER OF EAGLES and WASHINGTON STATE AERIE, FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	NO. 99-2-01214-1 ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Apr. 14, 2000)

THIS MATTER came before this Court on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Summary Judgment Dismissing All Claims. The Court has considered the following documents:

1. Plaintiffs' Motion for Summary Judgment;
2. Declaration of Rosemary Daszkiewicz in Support of Motion for Summary Judgment;
3. Declaration of Alton F. Brasher in Support of Motion for Summary Judgment;

4. Declaration of Charles N. Tarner in Support of Motion for Summary Judgment;

5. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment;

6. Declaration of Robert Wahls;

7. Defendants' Reply Memorandum in Support of Motion for Summary Judgment Dismissing All Claims;

8. Supplemental Declaration of Charles N. Tarver in Support of Plaintiffs' Motion for Summary Judgment;

9. Supplemental Declaration of Rosemary Daszkiewicz n Support of Plaintiffs' Motion for Summary Judgment;

10. Defendants' Motion for Summary Judgment Dismissing All Claims;

11. Defendants' Memorandum in Support of Motion for Summary Judgment Dismissing all Claims;

12. Affidavit of John W. Widell In Support of Motion for Summary Judgment;

13. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment;

14. Declaration of Rosemary Daszkiewicz in Opposition to Defendants' Motion for Summary Judgment; and

15. Plaintiffs' Reply in Support of Their Motion for Summary Judgment.

NOW, THEREFORE, IT IS ORDERED that:

A. Plaintiffs' Motion for Summary Judgment is GRANTED.

B. Defendants' Motion for Summary Judgment of Plaintiffs' claims under Chapter 49.60 RCW is DENIED.

C. Defendants' Motion for Summary Judgment of Plaintiffs' claims based on Washington State Constitution is GRANTED.

D. Defendants' Motion for Summary Judgment of Plaintiffs' Consumer Protection Act claim is GRANTED.

DONE IN OPEN COURT this 24 day of March, 2000.

/s/ Richard A. Strophy
HONORABLE
RICHARD A. STROPHY

Presented by:

CAIRNCROSS & HEMPELMANN, P.S.

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Fraternal Order of Eagles,
Washington State Aerie

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 99-2-1214-1
GRAND AERIE, FRATERNAL ORDER OF EAGLES, et al.,	)	
Defendants.	)	

COURT'S RULING

BE IT REMEMBERED that on January 28, 2000, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

APPEARANCES OF COUNSEL:

For the Plaintiffs	**ROSEMARY DASZIEWICZ** **Cairncross & Hempelmann** **70th Floor, Columbia Center** **701 Fifth Avenue** **Seattle, WA 98104-7016**
For the Defendants	**JOHN W. WIDELL** **Hall Zanzig Widell** **1200 Fifth Avenue, Ste. 1414** **Seattle, WA 98101**

REPORTED BY: Aurora J. Shackell,
Official Court Reporter
C.S.R. No. SHACKAJ334KD

[2] THE COURT: The parties before the Court have made cross-motions on summary judgment pursuant to Civil Rule 56, primarily on the issue of whether or not the defendants – I'll just refer to defendants as Grand Aerie with the understanding it includes the State Aerie as well – have violated Chapter RCW 49.60, the Washington Law Against Discrimination. Defendant Grand Aerie's motion for summary judgment also seeks dismissal of the Plaintiff's causes of action grounded on the Consumer Protection Act and Equal Rights Amendment – one is statutory and one is constitutional – to which the plaintiffs have responded that those issues are not yet ripe for summary judgment, assuming the Court would reach it at a later point. And I'm inclined to, given the comments of Mr. Widell, reserve on those issues at this point.

So that brings us back to the primary cross-motions which I believe are before the Court, and that is, whether or not the conduct of the defendants, the Grand and State Aeries, are in violation of Washington Law Against Discrimination. First of all, let me tell you both that the briefs and the materials have been excellently presented and prepared – voluminous, but that's the nature of it.

First, by way of preface, let me tell you that [3] you're looking at a judge who is a Rotarian – on leave of absence. Because of certain court duties, I'm not able to consistently make meetings – formerly an Elk and a person who is generally familiar with and acquainted with many people who are Kiwanians, Eagles, Elks, Rotarians, Soroptomists, and certainly I respect the right we all have to join and be

part of organizations that give us identity and enhance our quality of life.

I also have a recent experience with Eagles, the bird, the natural entity. In kind of an interesting experience this Christmas, one of my adult sons gave me as a gift from he and his wife and my grandson, a beautiful close-up photograph of an eagle in natural environs on profile, beautiful, with a saying that "Eagles Are Leaders. They don't flock together; you find them one at a time; they stand somewhat apart from the rest." And I don't know exactly why that came to mind when this case was first assigned to me and then now had come here for decision on the summary judgment motions filed. But just kind of an observation, perhaps a serendipitous, coincidental experience that is more happenstance than anything else, but I did reflect on the nature of eagles and why they're held in high esteem, which I'm sure, in part, is why they're [4] the symbol of this organization, Fraternal Order of Eagles.

Lastly, a personal observation relating an early law school experience to the roll that a judge has in cases such as these. I reflect back to my first year of law school. I don't know if you remember Jon Housman and *The Paper Chase*. During the first orientation session of law school, they said "Take a good look at the person on either side of you, front and behind you, because at least two of them won't be there by the time you finish," to intimidate law school students. It's a tough grind, and the paper chase is a lot. And part of that first-year orientation in that vein included an assignment to read about ethics and the social policy behind the rule of law and how lawyers, judges, legislators, governors, and other public officials and so forth all relate to each other in making and applying the

law. And one of the required readings was a book called *The Bramble Bush*, and the single premise of the book was: "The law is what these men do." And those words are somewhat chauvinistic, but that was the subtitle of the book. And the point was: Is the law really what the legislature prints in the statutes found in those books over there, in the words and phrases and punctuation of [5] the statute, or is it really what these men – judges – say it is, when they interpret it. Of course, we're more enlightened now. I think that phrase would be the law is what these "persons" do who have the function of interpreting, applying or enforcing the law.

And now, all of you here in this courtroom who are obviously very interested in this matter, have witnessed the argument of counsel for both sides, excellently prepared, having made their points in writing, especially, as well as, orally to the court, their oration. There's an opportunity for eloquence and there's an opportunity for scholarship and discussing these issues not only emotionally but also academically and analytically. Mr. Widell has in part of his argument stated that, for the Court to rule on these motions, my first obligation is to consider rules of statutory construction, and that's when lawyers and legal people become, in a sense, legal plumbers. Do the pipes fit? Fit one pipe into the other. And if so, you have a connection that doesn't leak and will carry water from A to B. What does the law say, and what does it mean and is it clear? And if it isn't clear, then the law is what these persons do, what judges say it is. Then there's a right to have the judge's ruling reviewed by another set of persons, a [6] three-judge panel of the court of appeals. And if one of the parties don't agree with what those people do in interpreting and applying the law, then we have a final

resort, at least in our state system, of the State Supreme Court: What those nine people, justices, do.

And I like to kiddingly remind my predecessor on this bench Judge Gary Alexander, now Justice of the Supreme Court Gary Alexander, whenever we see each other on occasion socially, "You know, you Supreme Court judges, really the truth is, you're not last because you're right, you're right only because you're last," and that gets a laugh from him. So I don't have any perception that my decision here is infallible here, and that's why we have courts of appeals and supreme courts, to make a final analysis and decision, if that is necessary.

But my task in statutory construction is governed by principles that have been discussed by the parties in their briefs and alluded to in their arguments. And I first determine whether or not the statute is clear and unambiguous, because the first rule of statutory construction is the Court construes the law as it's stated by its plain and ordinary meaning. And when it is clear and unambiguous, I am to give the words of a statute their plain and ordinary meaning, and I [7] construe the statute as a whole so as to avoid an absurd result. Well, you and I all know that communication is not a very simple process. We have verbal and nonverbal cues. We have manners of speaking. What is meant by the speaker and heard by the listener can be two different things. What meaning the speaker attaches to one word may have a different meaning [sic] the listener attaches to that very same word. We have context issues. So what may at first glance be fairly clear communication by the written word may require some further, more careful analysis. And the starting point in statutory construction is for the Court to read the text of the statute and draw inferences concerning the meaning of

the words and phrases from their grammar, composition and sentence structure.

In that regard, punctuation is a sometimes critical part of any statute enacted and, therefore, must be considered in the interpretation of what it expresses. And so we get into that wonderful experience we all can remember, and I vividly remember in my grade school and high school parochial education, diagramming of sentences, parts of speech, grammar and punctuation. And a lot of my friends hated it. Frankly, I sort of loved it. I suppose that's why I [8] ended up in this profession as opposed to science or numbers or what have you. But punctuation has an important purpose, and given the rules of punctuation and grammar, we divine and interpret the written words and phrases.

In construing this anti-discrimination statute, I give, therefore, careful consideration to how it is punctuated, how it is worded. Counsel has, putting up the other little chart, highlighted the words of the statutory provision in issue. First of all, let's look at the entire context of the statute. The statute prohibits discrimination, and it prohibits discrimination against people regarding certain of their rights, all citizens of this state, regardless of their gender. I prefer not to use the word "sex" in this context, but, again, we get into semantics. "Sex" can imply many things, but "gender" is very clear. We can easily distinguish between one gender or another, usually – I say that advisedly nowadays because of genetic engineering and modern science – but you're either male or female. That's what we're talking about when we say gender. Sex can imply other things, sexual preference or sexual conduct, whatever it is. But gender is what you are in terms of whether or not you're male or female.

[9] According to the statute at issue, all of us, regardless of gender, have the right to full enjoyment of public accommodations without discrimination. That's the general rule. However, some discrimination in access to certain accommodations may be by legislative policy allowed. That's what we call an exception to the general rule, and the statute in issue is the one which specifies the exception to the general rule of no discrimination by gender. The legislature further declares in this statute, given the broad context, that it is a "rights protection" statute and, therefore, is to liberally be construed to accomplish its purpose, which is: We don't allow discrimination for any inappropriate reason, so we're going to liberally construe the law so as to cover as many circumstances within that prohibition of discrimination as are reasonably and logically possible.

Thus, the next rule of statutory construction after analysis of the language, the words and the punctuation, is that remedial statutes are to be construed liberally in favor of their application to all appropriate situations, and any exemptions or exceptions to the statute are to be construed or applied strictly. So if you want to escape the law relating to anti-discrimination, you have a tougher row [10] to hoe than if you want to come under the law and be protected by anti-discrimination. IRS teaches that concept very well. The general rule is: We tax everything you do, everything you say and breathe, unless you can satisfy us you come under some deduction or exemption. And I'm being a bit facetious in trying to illustrate the principle.

So when I construe 49.60.040(10), an "exemption" statute, I do so strictly in considering what organizations and what conduct is exempt from the anti-discrimination

law. Because the legislative purpose in passing such a law is to have an inclusive society and to reduce conflict based upon treating others disparately unfairly merely because they're different, unless there's a darned good natural and positive reason. And, really, isn't that the essence of where we're at here? Accordingly, the Court's process, is tempered in a methodical construction of laws based upon the meaning of the words used and appellate court decisions involving the same or similar words in getting to a result.

When I look at then the exemption provision, I conclude that the exclusion provision of this law against anti-discrimination, first of all, applies to places of public accommodation, where the public [11] gathers, congregates or assembles for amusement, recreation or public purposes. I'll get back to public purposes in a moment.

Now, in order to be excluded from this anti-discrimination against persons, regardless of their gender, in their right to fully enjoy public accommodations, to recreate, entertain themselves and congregate for public purposes, any institute, bona fide club or place of accommodation which by its nature must be strictly private, including fraternal organizations.

Now, Mr. Widell has argued that this fraternal organization called the Fraternal Order of Eagles is a social club, and "fraternity" has a common definition: A single-sex organization. It occurred to me in reading the materials, that the legislature decided not to define for little ol' judges like me what's fraternal organization. There are many laws that start out with "definitions", and have multi-subsection definitions of various terms used in that law. Read the Department of Revenue laws and regulations; there are numerous definitions of terms used.

But what is the definition of fraternity, I ask myself, not having ever been a member of a fraternity. So I referred to Webster's Unabridged Dictionary.

[12] Fraternal, first definition: "Of or relating or involving brothers." Significantly, it doesn't stop there, though. "Of or relating to or being a fraternity or society." And then the second generic definition is: "Derived from two ova." Then that led me late last night, early this morning, to resolve the definitional difference between fraternal and identical twins. Identical twins are from the same egg, and they're identical. Fraternal twins are from two different eggs and are born at different times and can be both male, both female or male and female. So fraternal isn't exactly a male thing. I then went on to look at the word "fraternity": "A group of people associated or formally organized for a common purpose, interest or pleasure . . . A fraternal order . . . A men's student organization formed chiefly for social purposes having secret rights and a name consisting of Greek letters." That's the classical thought-of application of fraternity to a college organization. But the initial sub-definition, though, group of "people" – doesn't say men, doesn't say women – "associated or formally organized for a common purpose interest." That's from the Webster's dictionary which folks like you and I use.

The Blacks Law Dictionary, that relates to legal [13] definitions of terms, has a double definition of fraternal. The first is "brotherly"; however, the second is "relating or belonging to a fraternity or association of persons formed for mutual aid and benefit but not for profit . . . Fraternal benefit, association or society, one whose members have adopted the same or a very similar calling, avocation or profession, or who are working in unison to accomplish some worthy object or who for that reason have joined

themselves together as an association or society to aid and assist one another and to promote the common cause. A society or voluntary association organized and carried on for the mutual aid and benefit of its members."

Those words sounded familiar when I read, "Welcome to the Fraternal Order of Eagles," one of the apparent membership pamphlets or booklets that is handed to prospective members or newly admitted members. I'm not exactly sure which.

The point I want to make about the first rule of statutory construction – giving words their ordinary, common meaning – is that while fraternal organization is not defined in the law, to say it admits only one definition single gender organization, I conclude, is not persuasive. And here's my reasoning: If [14] "fraternal" means only brotherly organizations are exempt, then apparently organizations made up of only women are not exempt from the anti-discrimination law by virtue of the literal singular definition of that term. And, to me, that's an absurd result. So I conclude "fraternal organizations" must be read to mean and include organizations of persons pursuing a common goal with a common philosophy and ethic, more than merely meaning organizations that are exclusive by gender to either males or to either [sic] females.

Then I consider the punctuation argument and the construction argument that has been alluded to by counsel. Mr. Widell argues that, obviously, the way the phrase is worded and punctuated means that fraternal organizations are not bound by the descriptive adjective "distinctly private." So when I consider that argument in light of what the scope of the law is, and the restrictive construction of its exclusive provision, I look to see what's the

legislative purpose. I conclude that the legislative purpose is to preclude discrimination for any reason, in this case, gender, in public activities and public areas of public accommodation as the word is used, and, accordingly, only entities that are by their nature distinctly private, including fraternal organizations, [15] may be excluded or exempt.

So, with all due respect, I reject the contention of Mr. Widell that the adjective distinctly private is not critical to whether or not a fraternal organization, be it male or female, is exempt from the discrimination law. To me, that phrase and that modifier goes to the heart of the statute and any exemption from it.

If you're an organization which is public-like and you operate and conduct yourself in a way that's consistent with an open and more-public-than-private organization, you are not distinctly private. But if you have not only a secret handshake but you limit yourself not only by terms of gender but by terms of other criteria, profession or whatever it is, a hobby or something of that nature, and you don't go out and proselytize to a great extent for members from any and all walks of life but have a very strict and limited way in which you induct members, you're distinctly private; and the policy of the legislature is not to fetter with that associational process if it maintains a distinctly private character.

So having examined the statutory language, my conclusion is that rules of statutory construction would not mandate, as defense has argued, dismissal of [16] this cause of action as not coming under the purview of RCW 49.60, the Washington Law Against Discrimination. Having found and concluded that definitionally the State

and Grand or, for that matter, the Local Aerie are not distinctly private and are not therefore excepted from the statute, my next task is to apply the additional factors discussed in part here today and to determine whether or not this fraternal organization called the Eagles is distinctly private.

First of all, one of the factors in the briefs and in the case law is for the Court to consider the selectivity of membership of the organization in issue. And I'm mindful of the principle about which I'm sure we've all heard, "A rose called by any other name is still a rose." We look at not merely what an organization says about itself or what it calls itself in its literature, but more significantly, we look at what that organization actually does and how it operates. Actions speak louder than words. The focus, therefore, on determining whether it is distinctly private is the actual practices of the organization under examination, not what it says about itself or even in part of what the literature says about itself.

So let's look at what the literature says about itself. Mr. Widell in his brief and in his argument [17] here before the Court today contends that the Fraternal Order of Eagles, beyond being a familial brotherhood with emphasis on rituals involving the manly virtues, is purely a social club.

However, the literature of the Fraternal Order of Eagles talks about the story of Eagles, refers to other fraternal orders which promote good fellowship, do good deeds, provides death benefits or other benefits to their members and states with pride: "But the Eagles go farther than that," I'm quoting from the brochure, "They reach outside their own ranks to fight for the welfare of all. To

call the roll of early Eagle crusades – for a Workmen's Compensation Act, Mothers' Pensions, Old Age Pensions, and Social Security Laws – is to know what the Hoosier congressman, Louis Ludlow, had in mind when he said of the Order, 'It reaches out and tries to help in solving the distressing and difficult problems of human relief.'" FDR is even alluded to with the quotation, "May its possession inspire your members to rededicate their efforts and those of the fraternity to the insuring of such economic and political conditions as will bring a greater degree of happiness to our people."

Further comments in the "Welcome . . . " pamphlet refer to Eagle programs as being, in part, " . . . What [18] Eagles are all about to provide support for making democracy work and helping freedom ring around the world . . . " And then as alluded to by plaintiffs in their pleadings: "The dream of Eagledom is ordinary men and women everywhere are entitled to and shall enjoy the right to life, liberty and pursuit of happiness with some reasonable chance of catching up to it in their lifetimes."

The pamphlet goes on to talk about not just social programs, but it does talk about "social programs and varied entertainments for you and your family." Talks about civic programs, "Eagle Aeries everywhere are leaders in humanitarian, civic and patriotic programs. We need your active participation of our many service projects to better serve others and make our community and our country a better place." And, finally, the brochure appeals to the prospective member to observe the fraternal laws and says, in part, "This, after all, exemplifies the principle of equality, and in showing no partiality to any of the members all are receiving justice, which is another principle of our Order." And the brochure concludes with the

eagles slogan, "Every member owes at least one new member to his Aerie each year. A large membership makes it possible for us as a fraternity to give you so much for the small dues you [19] pay."

I conclude from those comments as well as the dictionary definitions that "fraternity" has as much do with a shared common purpose than it does with a men's club, if you will. And so looking not only to acts and practices, but to the defendants' own literature, and listening to the arguments of counsel, I find and conclude that there are no material facts about which there's a genuine dispute regarding the FOE's aggressive and wide range of membership enhancement programs and goals, such that I conclude that the selectivity of membership is minimal in the Eagles.

The next factor for review by the Court in determining whether or not an organization is distinctly private is its size. Local Aeries in Washington average over 600 members. The state aeries have over 66,000. Nationally or internationally, there's approaching a million to over a million. But, certainly, the Court finds that the membership size and the membership enhancement programs are markedly different from those clubs or groups under scrutiny in the case law cited to the Court, such that in terms of considering and applying that factor, that one consideration, the size of Eagles and the local Aeries would militate against a finding that Fraternal Order [20] of Eagles is distinctly private.

The next consideration is whether or not the community and the protected class – women – can participate in activities of the organization. It is, in my assessment of the record before me, beyond cavil or genuine dispute that the

Eagles are an active outreach organization in the community that involves community members to participate in projects to aid other community members who are nonmembers and involves nonmembers in the activities of the organization from time to time such that I could not, given consideration to that factor, conclude that the Fraternal Order of Eagles is distinctly private.

Another factor is how admission of women would affect the male members' rights of association. The Grand Aerie and State Aerie argue, "Well, this is brotherhood and we have rituals, and it would significantly and adversely affect the ability of the brotherhood to maintain this close familial relationship and observe its rituals if women were admitted." Counsel has done a very good job, in my view, on this point of arguing vigorously for his clients, the Defendants Grand and State Aeries. And with all due respect to counsel in that regard, even the most skillful of us as attorneys have ever been [21] really able to make a silk purse out of a sow's ear, and on this issue, what is fatal to the Grand Aerie's position is that women have been allowed to remain. What does that say to the Aerie's intense argument that we can't be the club we want to be if we have women? If that was true and if that was a laudable and valid position, then the Grand Tribunal should not only have withdrawn its Opinion 750, but decreed that, henceforth, all current female members must be expelled and excluded to preserve this precious fraternal relationship that we must foster in order to be the organization our literature says we seek to be.

Because it is the essence of the Washington Law Against Discrimination to prohibit discrimination against persons which would deny them full enjoyment of any places of public accommodation because of gender, it does

matter whether the challenged organization, even a fraternal organization, is distinctly private or not, and that consideration is more significant that [sic] whether it's composed only of men or only of women. I conclude, therefore, that, in that context, the terms "fraternal organization" and "distinctly private" are sufficiently ambiguous to warrant this court to construe the exception – in light of the liberal purpose of the statute – strictly and in a way that [22] reinforces accomplishment of that purpose.

And this conclusion is arrived at in light of the requirement that the Fraternal Order of Eagles Grand and State Aeries have the burden of convincing this Court that the Fraternal Order of Eagle comes within the exception. The burden is not on the plaintiffs to establish that the Grand and State Aeries are not within the exception or exemption. And if there even be that burden, the plaintiffs have sustained it.

In coming to this decision I have come to, to grant the plaintiffs' motion for summary judgment that the conduct of the Grand and State Aerie is in violation of the Washington Law Against Discrimination by restricting membership in the aeries to only males, I have not done so lightly. I have done so with the recognition that persons do have the right to associate and restrict their associations in a way that could be based upon gender or other considerations such as a specific religious denomination, but that is only when they are strictly or distinctly private in activity and nature. There is nothing about the Fraternal Order of Eagles, almost a million strong across this country, that tells me that its goals, its purposes or its conduct is distinctly private. It is the opposite. And I congratulate

the Eagles because of that. I think [23] that's what makes it vital and valid and wonderful.

And, finally, a postscript by way of anecdote, not considered in my decision, but it's a part of my life's experience. As a Rotarian, I was a member of our Olympia club – have been and still am a member of over 20 years – and recall well the debate within Rotary about whether or not women should be included or excluded. And I recognize there are distinctions – which is why I didn't give this any weight in my decision-making process – between a club such as Rotary based upon business associations and the promotion thereof and other types of clubs. But just anecdotally, for what it's worth, perhaps by way of editorializing or dicta, but after the issue of women members was resolved by Rotary being required to open its doors to women as well as men in the business community, I found that Rotary was a much more viable, progressive and effective organization in pursuing and meeting its goals. And yet some of us old guys that like to tell our war stories and be "buds" and do the male bonding thing still were able to do that, still do, without jeopardy to the club's traditions and rituals and with a greater respect for women's networks and how women among themselves seek their own mutual support and enlightenment. And when the two coalesce [24] together without artificial distinctions because one is male and one is female, there's not activity in which the organization can't be successful.

Having said all that, I want to again thank counsel for your excellent arguments on the law and on the policy that your clients believe should be followed. It is true that this case is of first impression apparently in Washington, if not other states. The decision I've made is without criticism of the sincere convictions that are behind the position the

Grand and State Order of Eagles have taken, but I am simply concluding, based upon the language of the statute, and the conduct of the organization, it is not permitted by my construction and application of the Washington Law Against Discrimination.

I will sign an appropriate order on presentation. Do either counsel have questions?

MR. WIDELL: Your Honor, I can see no reason that the Court should not go ahead and resolve the entire case. The Equal Rights Amendment – there's no discovery that could yield state action in this case or that can present evidence of the state action. There's – you know, this case – we ought to be able to present an appropriate order that resolves the entire case, incorporates Your Honor's decision and moves this [25] case forward to the Court of Appeals as quickly as possible. And so I'd ask that counsel be given a chance to agree on a form of order that resolves the entire case, and perhaps you can give us your views on the application of the Equal Rights Amendment to the Washington constitution in that regard.

THE COURT: My initial reaction was favorable to your argument, but that's because I didn't have the benefit of a meaningful response from the plaintiffs other than, "Your Honor, there should be more time allowed before you reach those issues, so that further discovery, if appropriate, could be brought to bear on resolution of your argument."

Facially, I understand where you're coming from and the authorities you've cited, but, by the same token, I do not want to take the position to force counsel into, at this point, defending the motion without allowing the two of you to talk between now and whatever time an order is

presented. But, really, I guess this is where lawyers check their holes cards and say, "Do we think we really have an issue here that we want to make a record on before we go up, or are we satisfied we're in the best position at this juncture, and we either concede the issue substantively one way or the other or leave the issue out for appellate [26] purposes." That's for counsel to decide, and I'm not going to preempt that at this point.

My expectation is that in conferring on language of an order, you can see if you can resolve that one way or another, either conceding that it's out, or the plaintiffs withdrawing those causes of action to take them out without prejudice, and if agreement cannot be reached, then on presentation of an order, you can communicate that to me.

I'm going to leave it at that. What I'm trying to do is think of a scenario whereby you've got two weeks or some agreeable time beyond that to present the order which would give the plaintiffs an opportunity to try and initiate or take discovery necessary to bear on these remaining issues if I still have to hear them. But I do think this matter shouldn't be protracted too far in the future in order to resolve those issues as well. So unless I get something extremely persuasive either by way of further factual discovery or by legal citation from the plaintiffs, my initial reaction is that those issues are less persuasive than the one argued under 49.60. If that's enough of a tilt or hint, so be it.

Again, thank you, Counsel, for your excellent presentation, and I appreciate the interest of those [27] here in attendance. Obviously, it's an important issue to you all. I don't count heads and make a decision based upon whether

there is nobody or a lot of people in the courtroom; although, it does raise my anxiety level about how I communicate. All of you have a pleasant day, and Court will be in recess.

Honorable Richard A. Strophy
Noted for Hearing: 1/14/00
(Pursuant to Stipulation On
Amended Scheduling Order
dated 11/4/99)

SUPERIOR COURT OF WASHINGTON FOR
THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; and ALICE F. VASSAR; WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, vs. GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES and FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	NO. 99-2-01214-1 DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * *

III.

PLAINTIFFS' SUMMARY JUDGMENT MOTION IS NOT SUPPORTED BY THE FACTS

Plaintiffs' motion would fail even if Washington's discrimination law did not expressly exempt fraternal organizations such as the Eagles. The Eagles are a "distinctly private" club, which the statute recognizes as exempt. RCW 49.60.040(10). Such clubs have a constitutionally protected right to freedom of association.

A. The Eagles' Constitutional Right To Freedom Of Association Would Be Violated If The State Required The Order To Admit Women.

Washington's discrimination law exempts private clubs and associations because those organizations have a constitutionally protected right to freedom of association. The United States Supreme Court has explained that there are two types of freedom of association: intimate and expressive. *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 3249, 82 L. Ed. 2d 462 (1984). The present motion concerns the Eagles' right of "intimate" association. The Supreme Court described the reason for protecting this right of association as follows:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from

> close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

104 S. Ct. at 3250 (citations omitted). The Supreme Court has observed that regulating membership policy is an infringement on freedom of association:

> There can be no clearer example of intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

104 S. Ct. at 3252 (citations omitted).

In *Roberts*, the Court suggested several factors which might be relevant to a determination whether an organization is sufficiently "intimate" to receive constitutional protection. Such factors include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." 104 S. Ct. at 3251. Applying those factors to the Eagles, it is apparent that the Eagles are entitled to constitutional protection of their freedom to associate only with men.

1. The Eagles Are Not Organized For a Business Purpose.

The Fraternal Order of Eagles is a social club.[40] They are not a civic or business group. The Eagles do not promote the business or economic interests of their members.[41] Conducting outside business at aerie meetings is strictly forbidden.[42] Aerie meetings and official functions do not provide any opportunity for members to promote their business, sell products, network, or otherwise engage in business activity.[43] Unlike other organizations, the Eagles do not offer classes, training or other opportunities for members to develop business skills or contacts.[44]

Organizations like the Eagles which have a social rather than a business purpose have been held to be private clubs entitled to constitutional protection. *See, e.g., Louisiana Debating and Literary Ass'n. v. City of New Orleans*, 42 F.3d 1483, 1494-96 (5th Cir.), *cert. denied*, 515 U.S. 1145 (1995); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1204 (D. Conn. 1974) ("To have their privacy protected, clubs must function as extension of members' homes and not as extensions of their businesses").

On the other hand, where business activities are prevalent, courts have determined the organization is not entitled to constitutional protection. *See, e.g., Roberts*, 104

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[40] *Id.* at ¶ 4

[41] *Id.*

[42] *Id.* at 5

[43] *Id.*

[44] *Id.*

S. Ct. at 3247, 3254 (Jaycees); *Board of Dirs. Of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 1944, 1946, 95 L. Ed. 2d 474 (1987) (Rotary). *See also, New York State Club Ass'n., supra.*

Here, the Eagles' social rather than business purpose entitles them to constitutional protection.

2. The Eagles' Membership Practices Are Highly Selective.

As a social, fraternal organization, the Eagles are highly selective in their membership practices. The Eagles do not advertise for members, nor do they solicit membership at public functions.[45] To become a member of the Fraternal Order of Eagles, an individual must be proposed for membership by two current members in good standing of the aerie.[46] Members may not propose an individual for membership unless they believe that the individual would be a good friend and fraternal brother.[47] No Eagle would propose another person as a member unless he would feel comfortable welcoming that person into his home. The requirement of sponsorship by current members enables the Eagles to be very selective about membership and is the reason relatively few applicants are rejected.[48]

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[45] *Id.* at ¶ 9

[46] *Id.* at ¶ 7; Widell Affidavit, Exhibit A, Statutes, Title III, Sections 70.1. and 70.9.

[47] Wahls Declaration at ¶ 9.

[48] *Id.*

In addition to personal sponsorship, there are minimum qualifications which must be met by each prospective member. No person may be proposed for membership in an aerie of the Fraternal Order of Eagles unless that person is male, at least 21 years of age, professes a belief in a Supreme Being, and affirms that he does not advocate the violent overthrow of his lawfully elected government.[49]

Each prospective member must be interviewed and recommended by a Local Aerie Interviewing Committee.[50] The committee decides whether to recommend the applicant for membership. The sole criterion upon which the committee makes its decision is whether the applicant would be a good friend and fraternal brother to the current members of the aerie. Once recommended by the Aerie Interviewing Committee, the applicant must receive a majority vote in a secret ballot of the members at an aerie meeting.[51]

Courts routinely have held that membership practices similar to those followed by the Eagles are highly selective and entitle the organization to constitutional protection. *See, e.g., Louisiana, supra,* at 1496 ("[T]he admission process is very restrictive. Only existing members may propose a new member and a proposal does not ensure admission"); *Kiwanis Intern. v. Ridgewood Kiwanis Club,* 806 F.2d 468, 475 (3rd Cir. 1986) ("The sponsorship of the

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[49] *Id.* at ¶ 7; Widell Affidavit, Exhibit A, Statutes, Title III, Section 70.2.

[50] Wahls Declaration at ¶ 8; Widell Affidavit, Exhibit A, Statutes, Title III, Section 70.11.

[51] Wahls Declaration at ¶ 8; Widell Affidavit, Exhibit A, Statutes, Title III, Section 70.12.

existing member acted as a primary screening mechanism in the maintenance of the quality of membership"); *Cornelius*, *supra*, at 1203 (holding Elks a private club based on membership practices virtually identical to those followed by the Eagles); *Solomon v. Miami Woman's Club*, 359 F. Supp. 41, 44 (S.D. Fla. 1973) ("Selectivity has often been said to be the essence of a private club and selection by recommendation serves to draw a line of demarcation between admitting the general public and only the select few"). *See also*, *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1211, 1215 (N.J. 1999) (finding Boy Scouts' membership policy not selective because Boy Scouts does not require sponsorship by an existing member and the organization aggressively advertises and solicits new members from the general public).

In *Fraternal Order of Eagles v. Tucson*, 816 P.2d 255 (Ariz. App. 1991), an Arizona appellate court determined that a Tucson discrimination ordinance would not violate the Eagles' constitutional right to freedom of association. Disregarding the Eagles' requirement of sponsorship by two current members, interview with the membership committee, and a secret ballot vote by the aerie membership, the court decided that the Eagles' membership policy was not selective:

> As in both the *Jaycees* and *Rotary Club* cases, there is a low degree of selectivity for membership. The only requirements for membership, besides being a male, are being over 21, believing in a supreme being, and not being a member of the Communist party. Those are not requirements that reflect an intent to associate only with persons who share a "special community of thoughts, experiences and beliefs."

816 P.2d at 259.

The *Tucson* decision is inapplicable and unpersuasive in the present case. It involved a mid-level Arizona appellate court construing a municipal ordinance that differs significantly from the Washington statutory provision at issue here. Moreover, the *Tucson* case was wrongly decided. The majority of courts, including those cited above, have distinguished organizations such as Kiwanis that require sponsorship by current members, from organizations such as Jaycees which have no such requirement. Significantly, more than eight years have passed since the *Tucson* decision and no other court has ruled that the Eagles do not have a First Amendment right to freedom of association.

Based on their selective membership practices, the Eagles are a private club entitled to constitutional protection of their right to admit only men as members of the organization.

3. The Eagles' Facilities and Meetings Are Strictly Limited to Members Only.

Another criteria for establishing the private nature of a club is the extent to which non-members are permitted access to the organization's meetings and facilities. The Eagles strictly prohibit access to their meetings and facilities by non-members.[52] Under similar circumstances, courts have found the organization to be private and free to associate as they please. *See, e.g., Louisiana, supra,* at 1946 ("Each club has only one facility, which is maintained

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[52] Wahls Declaration at ¶ 10.

for the exclusive use of its members and guests. . . . Non-members are strictly prohibited from using the facilities").

On the other hand, courts have determined that organizations which permit or encourage non-members to participate in club functions and meetings are not private and may be subject to discrimination laws. *See, e.g., Board of Directors of Rotary, supra*, at 1946-47 ("Members are encouraged to invite business associates and competitors to meetings. . . . Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole world'"); *Roberts, supra*, at 3251 ("much of the activity central to the formation and maintenance of the [Jaycees] involves the participation of strangers to that relationship"); *Dale, supra*, at 1221 (holding that Boy Scouts' "practice of inviting or allowing nonmembers to attend meetings" was a factor in establishing that the organization "is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association").

Plaintiffs place heavy reliance on the size of the Eagles, contending that factor alone establishes that the Eagles are not a private organization entitled to constitutional protection. But plaintiffs cite no case in which size alone is determinative.

Based on the Eagles' strictly social purpose, lack of business activity, highly selective membership practices, and prohibition on access to meetings and facilities by non-members, the Eagles have established that they are a private club entitled to constitutional protection of their First Amendment right of intimate association.

B. The *Watson* Case Cited By Plaintiffs Is Inapposite.

Plaintiffs contend that one court already has determined that the Eagles have no right to freedom of association. Plaintiffs' argument is not well-founded.

In *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990), the issue was not whether the Eagles were exempt from federal discrimination constitutional law. The issue was whether the plaintiff stated a claim under § 1981 that the Eagles improperly refused to contract with him for the sale of a soft drink. The court took pains to note that it was not determining whether the Eagles were a private club:

> We therefore hold that plaintiffs can maintain a cause of action under § 1981 for refusal to contract without regard to the private club exemption of Title II. The plaintiffs do not seek to become members of Local 555. They seek relief because Local 555 refused on the basis of race to a [sic] make contract to serve them beverages. Because we determine that Title II does not affect the application of § 1981 to the making of contracts with private clubs, *we need not reach the question of whether Local 555 or the Grand Aerie are private clubs for purposes of § 2000a(e).*

915 F.2d at 242 (emphasis supplied).

The *Watson* court's analysis of the Eagles' First Amendment argument must be considered in light of the fact that the court was not determining whether the Eagles could be required to change their membership policy. Instead, the court was determining whether the Eagles had a First Amendment right to refuse to contract with the plaintiff. The degree of interference with the

Eagles' freedom to associate is significantly greater when the issue is who the Eagles may be required to admit as a member versus whether the Eagles may refuse to serve a soda to a guest.

The above arguments are all irrevelevant, really, because the Court has no reason to reach the constitutional issues. Washington's discrimination statute expressly exempts fraternal organizations. The parties' summary judgment motions should be determined on that basis.

IV.

CONCLUSION

Washington's discrimination statute expressly exempts fraternal organizations such as the Eagles. Even if it did not, the Eagles have established that they are a "distinctly private" organization entitled to First Amendment protection under RCW 49.60 and federal law. For the foregoing reasons, defendants respectfully ask the Court to deny Plaintiffs' Motion for Summary Judgment.

DATED this 23rd day of December, 1999.

HALL ZANZIG WIDELL PLLC

By /s/ John W. Widell
John W. Widell
WSB No. 18678
Attorneys for Defendants

Honorable Richard A. Strophy
Noted for Hearing: 1/14/00
(Pursuant to Stipulation On
Amended Scheduling Order
dated 11/4/99)

SUPERIOR COURT TO WASHINGTON FOR
THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; and ALICE F. VASSAR; WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, vs. GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES and FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	No. 99 2 012141 DECLARATION OF ROBERT WAHLS

ROBERT WAHLS declares:

1. I am over eighteen years of age and otherwise competent to make this declaration

2. I am the Grand Secretary of the Fraternal Order of Eagles. I have held that position since 1995. My responsibilities as Grand Secretary include accounting, maintaining membership rosters, and keeping all records of the Grand Aerie of the Fraternal Order of Eagles. In addition to being Grand Secretary, I currently serve as Secretary to the Board of Grand Trustees. I was Worthy President of my home aerie in Carlisle, Pennsylvania from 1971 to 1972. I served as Secretary for the Carlisle Aerie from 1972 until 1995. I was President of the Pennsylvania State Aerie from 1984 to 1985 and President for the Eastern Region of the Fraternal Order of Eagles from 1985 to 1986.

3. I am familiar with the Constitution, By-Laws, Statutes, and Policies of the Fraternal Order of Eagles. Because I maintain the membership roles [sic], I am knowledgeable about the membership practices of the Order.

4. Since the order was founded in 1898, the Fraternal Order of Eagles has been a fraternal organization. Eagles refer to one another as "brothers." The purposes of the organization are social and charitable. The Order is not a civic or business group. The Order does not promote the business or economic interests of its members.

5. Conducting outside business at Fraternal Order of Eagles aerie meetings is strictly forbidden. Aerie meetings and initiation ceremonies take place in strict accordance with a memorized ritual. The ritual does not provide any opportunity for members of the aerie to promote their

business, sell products, network, or otherwise engage in economic activity. It would be wholly inappropriate to do so. The Eagles do not offer classes, training or other opportunities for members to develop business skills or contacts.

6. The Fraternal Order of Eagles does not advertise for members, nor do they solicit membership at public functions. Because the Order loses members every year due to death and attrition, members recognize that recruiting new members from among their personal friends and family members is critical to the continued viability of the organization. An aerie needs at least 70 members to function as a viable aerie. There are currently 1,752 Eagles aeries with a total of 780,574 members worldwide. There are currently 1,632 Eagles auxiliaries with a total of 382,277 members worldwide.

7. To become a member of a Fraternal Order of Eagles aerie, an individual must be proposed for membership by two current members in good standing of the aerie. Members may not propose an individual for membership unless they believe that the individual would be a good friend and fraternal brother. No person may be proposed for membership in an aerie of the Fraternal Order of Eagles unless that person is male, at least 21 years of age, professes a belief in a Supreme Being, and affirms that he does not advocate the violent overthrow of his lawfully elected government.

8. In addition to being recommended by two members, a prospective member must be interviewed and recommended by a local aerie interviewing committee. The interviewing committee interviews prospective members. The purpose of the interview is social and fraternal. The

applicant gets a sense of the personalities of current members. The committee gets a sense of the applicant's personality. The committee decides whether to recommend the applicant for membership. The criterion upon which the committee makes its decision is whether the applicant would be a good friend and fraternal brother to the current members of the aerie. The applicant must receive a majority vote in a secret ballot of the members of the aerie at an aerie meeting. As with the interviewing committee, the criterion upon which such a vote is made is whether the individual would be a good fraternal brother.

9. The Fraternal Order of Eagles is viewed by its members as a "familial brotherhood." The relationships among members of a Fraternal Order of Eagles aerie are similar to the relationships among brothers. No Eagle would propose another person as a member unless he would feel comfortable welcoming that person into his home. The requirement of sponsorship by current members enables the Eagles to be very selective about membership and is the reason relatively few applicants are rejected.

10. Local aerie facilities are not open to the public. Like many fraternal organizations, churches, schools, and other non-profit organizations with facilities that are not always in use, some Eagles aeries rent rooms in their physical facilities for weddings and similar special events. But members of the public have never been permitted to attend aerie or auxiliary meetings or social gatherings. Only members in good standing of a Fraternal Order of Eagles aerie or auxiliary may enter and use the facilities.

11. Aerie membership meetings and initiation ceremonies are performed in strict accordance with a

memorized ritual and may be attended only by members of an aerie. The memorized rituals are known only to aerie members. The rituals, which include numerous references to manly virtue and brotherhood as well as prayers and references to God, are significant and meaningful to members of the Order. The presence of women would inhibit these ritual practices which are the essence of membership in the Fraternal Order of Eagles. Many aeries practice their rituals extensively. Ritual competitions are an integral part of state, regional, and national Eagles gatherings. The rituals would lose their meaning if they were not performed among brothers who share a belief in a Supreme Being.

12. Members of the Fraternal Order of Eagles overwhelmingly support the continuation of the Order, including its ritual practices. At the 1998 meeting of the Grand Aerie, the Grand Aerie Delegates (all Worthy Presidents and Past Worthy Presidents of all local aeries, nationally and internationally), voted nearly unanimously to maintain the Eagles' males-only membership policy.

13. All Eagles aeries are non-profit fraternal organizations. Aeries are supported strictly by private funds.

14. Copies of the articles of incorporation for the Tenino Aerie and the Whidbey Island Aerie are attached to this Affidavit as Exhibits A and B. The articles of incorporation of the plaintiff aeries state that the aeries are subject to the constitution and statutes of the Grand Aerie.

15. The Fraternal Order of Eagles has been determined by every governmental agency that has evaluated the issue to be a fraternal organization. Local aeries obtain liquor licenses as private clubs or fraternal organizations.

The Grand Aerie is recognized by the United States Internal Revenue Service as a fraternal organization. A copy of the Internal Revenue Service's letter granting the order for exempt status as a fraternal organization under Section 501(c)(10) of the Internal Revenue Code is attached as Exhibit C.

The contents of this declaration are based upon my personal knowledge. I declare under penalty of perjury that the foregoing declaration is true and correct to the best of my knowledge.

/s/ Robert P. Wahls
Robert Wahls

PLACE: Columbus, Ohio

DATE: December 22, 1999

EXHIBIT A

Article No. 107896 [SEAL]

Department of State

Olympia

OFFICE OF THE

Secretary of State

I, BELLE REEVES, Secretary of State of the State of Washington, do hereby certify that

ARTICLES OF INCORPORATION

TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES

a Domestic Corporation, of Tenino, *Washington, were on the* 24th *day of* October, *A.D. 1947*, at 3: 40 *o'clock* P.M., *filed for record in this office and now remain on file herein, being duly recorded in Book* 402, *at page* 40-44, *Domestic Corporations.*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the SEAL of the State of Washington

[SEAL]

Done at the Capitol, at Olympia, this 5th *day of* November, *A. D. 1947*

BELLE REEVES
Secretary of State.

By /s/ Ray J. [Illegible]
Assistant Secretary of State

ARTICLES OF INCORPORATION

OF

TENINO AERIE NO. 564,
FRATERNAL ORDER OF EAGLES.

A resolution having been regularly adopted by Tenino Aerie No. 564, Fraternal Order of Eagles at a regular meeting of said Aerie held at Tenino, Washington, on the 10th day of October, 1947, pursuant to notice regularly

given, which resolution authorized and directed the incorporation of said Tenino Aerie No. 564 in the manner provided by Laws of the State of Washington, 1927 Session of the Legislature, Chapter 190, and in accordance with the provisions of Article 54, Constitution for Subordinate Aeries of Fraternal Order of Eagles, 1944 Edition; said resolution further directing the officers of the said Aerie to prepare and file the necessary articles therefor;

NOW, THEREFORE, The said Tenino Aerie No. 564, Fraternal Order of Eagles, hereby makes and files its Articles of Incorporation as follows:

ARTICLE I

The names of the persons associating themselves together for the purpose of forming this corporation, together with their places of residence, and offices in Tenino Aerie, Fraternal Order of Eagles, are

Name:	Office:	Address:
Fred H. Carpenter	Worthy President	Rochester, Wash. (Rt. 1)
George Marshall	Secretary	Tenino, Washington;
Chester E. Wilcox	Treasurer	Tenino, Washington
Edward F. Canady	Trustee 3 Yr. Term	Tenino, Washington;
Fred Klingenberg	Trustee 2 Yr. Term	Yelm, Washington;
Charles Ward	Trustee 1 Yr. Term	Yelm, Washington;

Floyd Butterton	Chaplain 1 Yr. Term	Tenino, Washington;
Frank Tilley	Conductor 1 Yr. Term	Olympia, Wash. (Rt.)
Archie R. Townsend	Inside Guard	Rochester, Wash. (Rt.1)
Bert E. [Illegible]	Vice President	Rainier, Wash.

ARTICLE II

The name of this corporation shall be and is TENINO AERIE No. 564, FRATERNAL ORDER OF EAGLES.

The name of the governing body from which this Aerie derives its rights and position and by which it is chartered is THE GRAND AERIE, FRATERNAL ORDER OF EAGLES.

ARTICLE III

The duration of said corporation shall be in perpetuity.

ARTICLE IV

The purposes of the corporation shall be to acquire, provide, maintain and operate a building or buildings to be used by the incorporation and such other persons or organizations as the privilege shall from time to time be granted to; to promote the fraternal and social purposes of the Fraternal Order of Eagles, to exercise all the powers, rights and privileges granted to subordinate aeries by the Grand Aerie, Fraternal Order of Eagles; to acquire and possess real and personal property to be used in whole or

in part for meetings of the Aerie and for all social and fraternal purposes of the Aerie; and to exercise all other powers that may lawfully be exercised by other corporations organized under the general incorporation laws of Washington, including the power to borrow money, and for that purpose to issue its bonds and mortgage its property to secure the payment of such bonds, PROVIDED, HOWEVER, That in the event of dissolution of this corporation or in revocation or surrender of the Charter issued to it as a subordinate aerie of the Grand Aerie, Fraternal Order of Eagles, title to the assets of this corporation shall pass to the Grand Aerie, Fraternal Order of Eagles.

ARTICLE V

The principal place of business of the corporation shall be located in the city of Tenino, County of Thurston, State of Washington.

ARTICLE VI

This corporation shall be and is organized without capital stock. Members of the corporation shall be the officers and members of Tenino Aerie No. 564, FRATERNAL ORDER OF EAGLES, so long as the corporation and Aerie shall continue to exist.

ARTICLE VII

All rights, powers, privileges and duties of the corporation shall be as limited by the laws of the State of Washington relating to incorporation of fraternal organizations and the provisions of Article 54, Constitution for

Subordinate Aeries, Fraternal Order of Eagles, with amendments thereto.

IN WITNESS WHEREOF the said Fred H. Carpenter, George Marshall, Chester E. Wilcox, Edward F. Canady, Fred Klingenberg, Charles Ward, Floyd Butterton, Frank Tilley, Archie R. Townsend, and Bert E. Tinstman have hereunto affixed their signatures this ___ day of October, 1947, in execution of these Articles of Incorporation.

/s/ Fred H. Carpenter
/s/ Bert E. Tinstman
/s/ Archie R. Townsend
/s/ Charles Ward
/s/ Frank Tilley
/s/ Fred Klingenberg
/s/ George Marshall
/s/ Floyd W. Butterton
/s/ Edward F. Canady
/s/ Chester E. Wilcox

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

THIS IS TO CERTIFY that on this 10th day of October, 1947, before me, [Illegible], a Notary Public in and for the State of Washington, residing at Olympia, personally appeared Fred H., Carpenter, George Marshall, Chester E. Wilcox, Edward F. Canady, Fred Klingenberg, Chester Ward, Floyd Butterton, Frank Tilley, Archie R. Townsend, and Bert E. Tinstman, to me known to be the identical persons who signed the foregoing instrument and acknowledged that they

signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein stated.

Subscribed and sworn to before me this 10th day of October, 1947.

/s/ [Illegible]
Notary Public in and for the State of Washington, residing at [Illegible]

EXHIBIT B

GRAND SECY. MAR 9 1972

ARTICLES OF INCORPORATION

OF

WHIDBEY ISLAND EAGLES, F.O.E. 3418

We, the undersigned incorporators, hereby associate ourselves together to form and establish a Corporation not for profit under R.C.W. 24.08, the laws of the State of Washington:

FIRST:

The name of the Corporation shall be WHIDBEY ISLAND EAGLES, F.O.E 3418, and the name of the grand body from which it derives its rights and powers is the Grand Aerie Fraternal Order of Eagles.

SECOND:

The location of the principal place of business and where the meetings are generally to be held shall be at P. O. Box 293, Coupeville, Washington and the location of its

registered office shall be at 208 Matheson Building, Mount Vernon, Washington.

THIRD:

The affairs of the Corporation shall be managed by a three man board of trustees to be elected as set out in Article TENTH.

FOURTH:

The Corporation is not organized for profit and the object and purposes to be carried on are: to promote fellowship and extend acquaintenceship among the members and their families, to the Jimmy Durante Children's Fund, Max Baer Heart Fund, Girl Scouts, 4-H Clubs, etc., to engage generally in any causes or objects in order to promote the cultural, social and literary welfare of the members and their families and the general welfare of the community and the citizens thereof. The Corporation shall not have authority to issue capital stock.

FIFTH:

The powers of this Corporation shall include but shall not be limited to: receive gifts and devises; purchase, hold, and convey real and personal property as the purpose of the Corporation may require; appoint such subordinate agents of officers as the business may require; demand assessments of members and sell or forfeit their interests in the Corporation for default with respect to any lawful provision of the By-Laws; enter into any lawful contracts and incur obligations essential to the transaction of its affairs for the purpose for which it was formed; borrow money and issue notes, bills, or evidence of indebtedness; and mortgage its property to carry out the purposes of its creation.

SIXTH:

The conditions of membership are: male, twenty-one (21) years of age or older. The name of the presiding office is Ted L. Hanks, (Worthy President) and the name of the Secretary is Robert Grover, who has custody of the Lodge Seal. The Worthy President and Worthy Secretary shall join in the execution of any contract by this Lodge to give it force and effect in accordance with the usages of this Lodge,

SEVENTH:

The Corporation shall not own or issue any shares of stock,

EIGHTH:

The names and places of residence of each of the incorporators are:

NAME	ADDRESS
James W. Blouin	P. O. Box 61 Coupville, Washington
Ted L. Hanks	P. O. Box 43 Coupville, Washington
Walter K. Brooks	P. O. Box 206 Coupville, Washington
Patrick H. Bisch	Box 183 Coupville, Washington
Robert M. Hill	Route 1 Box 128J Coupville, Washington

NINTH:

The term for which this Corporation is to exist is ninety-nine (99) years.

TENTH:

There shall be three (3) trustees of this Corporation. WALTER K. BROOKS, PATRICK H. BISCH and ROBERT M. HILL, all of Coupeville, Washington, shall be first trustees to serve until the first meeting on December 1, 1971, when their successors shall be elected to serve until the annual election of officers which shall be the fourth Monday of May and yearly thereafter. The trustees shall serve staggered three (3) year terms as provided in the By-Laws.

IN TESTIMONY WHEREOF, the parties have hereunto set their hands and seals this 25th day of October, 1971.

/s/ Walter K. Brooks
WALTER K. BROOKS Trustee

/s/ Patrick H. Bisch
PATRICK H. BISCH Trustee

/s/ Robert M. Hill
ROBERT M. HILL Trustee

State OF WASHINGTON)
SS
COUNTY OF ISLAND)

This is to certify that on this 25th day of October, 1971, personally appeared before me, WALTER K. BROOKS, PATRICK H. BISCH and ROBERT M. HILL, to me known to be the individuals described in and who

executed the within and foregoing instrument, and acknowledged to me that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year last above written.

/s/ Patricia K. Evarta
Notary Public in and for the State of Washington, residing at Coupeville.

EXHIBIT C

Internal Revenue Service
District Director

Date: OCT 17 1997

Department of the Treasury
P.O. Box 2508
Cincinnati, OH 45201

Fraternal Order of Eagles,
Grand Aerie
3030 Sullivant Ave.
Columbus, OH 43204

Person to Contact:
Gordon Schnur
Telephone Number:
513-241-5199
Refer Reply to:
EP/EO
Federal Identification Number:
39-0920675

Dear Sir or Madam:

This is in response to your request for a copy of your organization's group exemption letter.

In August 1991 we issued a determination letter which recognized your organization as exempt from Federal Income Tax under section 501(c)(10) of the Internal Revenue Code of 1986. Based on the information supplied, we also recognized the subordinates named on the list

your organization submitted as exempt from federal income tax under 501(c)(10) of the Code.

Your organization and each of its subordinates are required to file Form 990, Return of Organization Exempt from Income Tax, only if the gross receipts each year are normally more than $25,000. If a return is required, it must be filed by the 15th day of the fifth month after the end of the organization's annual accounting period. The law imposes a penalty of $10 a day, up to a maximum of $5,000, when a return is filed late, unless there is reasonable cause for the delay.

Unless specifically excepted, your organization and its subordinates are liable for taxes under the Federal Insurance Contributions Act (social security taxes) on remuneration of $100 or more to each of the organization's employees during a calendar year.

Your organization and its subordinates are not required to file federal income tax returns unless subject to the tax on unrelated business income under section 511 of the Code. If subject to this tax, the organization must file an income tax return on Form 990-T, Exempt Organization Business Income Tax Return. In this letter, we are not determining whether any of your organization or its subordinates' present or proposed activities are unrelated trade or business as defined in section 513 of the Code.

Your organization's Group Exemption Number is 0102.

Sincerely,

/s/ C. Ashley Bullard
C. Ashley Bullard
District Director

February
22,
1980

Gene Talburt, Secretary
Aerie No. 3418, F.O.E.
1655 E. Lynne Drive
Freeland, Washington 98249

Dear Brother Talburt:

On March 17, 1972, we wrote to Robert W. Grover, Secretary of Aerie No. 3418, at that time. We are enclosing a copy of that letter. To date we have had no response.

We are enclosing a copy of the Articles of Incorporation and we will appreciate if you will try to carry out the requests contained in the above noted letter.

We will appreciate if you will send us copies as requested in that your complete Articles of Incorporation may be retained in the files of this office as required in Section 123.5 of the Annotated Statutes.

With best wishes, I am

Sincerely and fraternally yours,

PAUL E. EICHMAN, GRAND SECRETARY
BY:
PEE:Cn
Encl.
cc/ Thomas Francis Yale, Worthy President

March
17
1972

Robert W. Grover, Secretary
Aerie Number 3418, F.O.E.
Post Office Box 293
Coupeville, Washington 98239

Dear Brother Grover:

On March 9, 1972, we received a copy of the Articles of Incorporation of your Aerie which had evidently been adopted by the Aerie on October 25, 1971.

We will ask that you refer to Section 123, of the Annotated Statutes, which covers the proper manner of incorporating an Aerie. In reading the copy of your proposed Articles of Incorporation, we find that you have not complied with Section 123.4, which provides that:

> *"All of the assets of any such Aerie so incorporated shall be subject to the laws promulgated by the Grand Aerie in the same manner and to the same extent as though such Aerie was not incorporated."*

We also find that you have not complied with Section 123.6, which provides:

> *"In all cases where an Aerie is incorporated, such Articles of Incorporation shall contain therein provisions that said Aerie is incorporated in conformity with, subject to and under the jurisdiction and control of the Laws of the Fraternal Order of Eagles."*

I do not know whether these proposed Articles have already been filed with the Secretary of State, of the state of Washington, as you did not furnish us with a copy of the certificate

which is furnished by the Secretary of State showing the date of incorporation of an Aerie; however, your Articles must be amended to conform with the provisions of Section 123, of the Annotated Statutes, and we will appreciate if you will furnish we with a copy of the amended Articles of Incorporation, along with the Certificate of Incorporation, furnished by the Secretary of State, or other official authorized to issue such certificates in your state, as this is necessary under the provisions of Section 123.5, of the Annotated Statutes.

With best wishes, I am

Sincerely and fraternally yours,

PAUL E. EICHMAN, GRAND SECRETARY
BY:
PEE:Cn
Encl.
cc/James Blouin, Worthy President

Honorable Richard A. Strophy
Noted for Hearing: 1/14/00

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNOR; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE M. RILEY; DIANE E. ROBERTS; JANET TRESENRITER; ALICE F. VASSAR, and WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, v. GRAND AERIE, FRATERNAL ORDER OF EAGLES and WASHINGTON STATE AERIE, FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	NO. 99-2-01214-1 SUPPLEMENTAL DECLARATION OF ROSEMARY DASZKIEWICZ IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. I am one of the attorneys of record for plaintiffs. I am competent to make the statements set forth in this declaration.

2. I live several blocks away from the Ballard Eagles Local Aerie. On several occasions I have purchased lunch there. When I ate lunch there earlier this week the females confirmed that the public can purchase lunch Monday through Friday, although they cannot purchase alcoholic beverages. The public can also

come to one of the two weekly dinners although, again, they cannot purchase alcoholic beverages.

3. Attached as Exhibit A is a copy of the proceedings of the Grand aerie's 1996 National Convention.

4. Attached as Exhibit B is a copy of the proceedings of the Grand Aerie's 1997 National Convention.

5. Attached as Exhibit C is a copy of the proceedings of the Grand Aerie's 1998 National Convention.

DATED this 7th day of January, 2000, in Seattle, Washington.

/s/ Rosemary Daszkiewicz
ROSEMARY DASZKIEWICZ

RESOLUTION NO. 2:

WHEREAS: We know that the Ritual is the basic part of every successful Aerie, and that it is the backbone of the Fraternal Order of Eagles, and

WHEREAS: At the present time a number of states and provinces are now conducting one man Ritual competition, and

WHEREAS: This one man Ritual would only be used for competition, and

WHEREAS: There is no set rules for this competition, and each state or province is coming up with their own rules,

THEREFORE, LET IT BE RESOLVED: That the Grand Aerie Ritual Committee set up a standard set of rules to govern this one man Ritual competition.

LET IT BE FURTHER RESOLVED: That the resolution be forwarded to the Resolutions Committee of the Grand Aerie to be presented to the delegates to the Grand Aerie Convention in Spokane, Washington, in July 1998.

RESOLUTION NO. 3:

WHEREAS: The Delegates and Past Worth President to the Washington State Convention held at Wenatchee Aerie No. 204 in this third week of June 1998, and

WHEREAS: Washington State being a leader in spearheading and/or supporting the Grand Aerie Officers in their endeavors in the past,

THEREFORE, BE IT RESOLVED: That we the Delegates and Past Worthy Presidents in this 100th year of fraternalism firmly support the Grand Aerie Officers in accordance with the Constitution and Statutes F.O.E. and all laws pertaining thereto.

RESOLUTION NO. 4:

WHEREAS: The Fraternal Order of Eagles' motto is "PEOPLE HELPING PEOPLE",

WHEREAS: All of our cities have been troubled by gangs,

WHEREAS: We need to help the children of our communities to become adults and have a future,

WHEREAS: This can be accomplished by educating these children to stay out of gangs through the specially trained officers of the Police Department,

WHEREAS: This program be called **G.R.E.A.T.**, which stands for *"Gang Resistance Education and Training"*,

WHEREAS: This program can be administrated out of the Memorial Fund Foundation,

BE IT RESOLVED: That at a business session of their 1998 State Convention, the Arkansas State Aerie voted to support this resolution and that it be forwarded to the 1998 Grand Aerie Convention in Spokane for their consideration.

RESOLUTION NO. 5:

WHEREAS: Members of the Search and Rescue Units are performing a vital service to their communities, and

WHEREAS: They are subject to a great many dangerous situations in the performance of their duties, and

WHEREAS: They are classed as auxiliary deputies under the Sheriff's Department, they are not classified at Law Enforcement Officers.

THEREFORE, LET IT BE RESOLVED: That Eagle Members in this Group also be covered under the Memorial Foundation Program; because of their dedication to the community and their volunteer work.

BE IT FURTHER RESOLVED: That a copy of this resolution be forwarded to the Grand Secretary immediately following the Idaho State Convention in June 1998 for action at the Grand Aerie Convention.

RESOLUTION NO. 6:

WHEREAS: It is the duty of the Grand Board of Trustees to act on all matters, big or small, concerning the welfare of our Order, and

WHEREAS: It is the responsibility of the Grand Board of Trustees to act as Fiscal Agent having authority over all funds and property of the Grand Aerie, and

WHEREAS: It is the duty of the Grand Board of Trustees to direct the overall business administration and establish major basic policies of the Grand Aerie.

THEREFORE: Let it be known that we are grateful and appreciative of their actions over this past year and that we show our CONFIDENCE and SUPPORT of this Grand Board of Trustees.

FURTHERMORE: We now ask that to show our appreciation to these Brothers, that they be retained to serve in the Grand Aerie, Fraternal Order of Eagles.

RESOLUTION NO. 7:

WHEREAS: Many Local Aeries and Auxiliaries and State and Provincial Aeries and Auxiliaries raise funds not covered by our Eagle Charities, and

WHEREAS: These units do not get credit from the Grand Aerie for their donations,

THEREFORE, BE IT RESOLVED: That the Grand Aerie establish a new fund for all of these charities to be known as the Home Charity Fund, an acronym for Hands Of Many Eagles, and this fund will be administered by the

Memorial Foundation. Submitted by the Board of Grand Trustees.

Before I continue I would like to ask Dick Steinberg to come up and explain what this means to us so tomorrow when you vote on it, you will know what you are voting on.

BROTHER DICK STEINBERG (Columbus, Ohio Victory Aerie): Grand Worthy President Bill, the Memorial Foundation has already amended their By-Laws to comply with the Internal Revenue Service regulations to provide assistance to other charities. This fund has been approved by the Board of Grand Trustees.

The purpose is to accept contributions from state and locals from any charity you earmark and the Memorial Foundation will then return a check to you for presentation to your designated charity. Thank you.

BROTHER VINCE MARINO: My Brothers, we will be voting on those tomorrow. The other resolutions that the Committee did not accept, I do want to present them to you, and we won't have a discussion today, but if any of you that wish to talk with the Resolutions Committee after this session is over, we would be very happy to meet with you, try to go over the reasons that the Committee did not accept these resolutions.

We have one resolution here from Chehalis, Washington. We spent a lot of time, we put a lot of effort into it, a lot of discussion. We are probably going to get reprimanded for not reading or presenting it, but there are a lot of things involved in it, and I would just like to just take a minute to read it so you will understand, but we will not be voting on it.

WHEREAS: Delegates of the Grand Aerie, Fraternal Order of Eagles, at their 28th Convention in the City of Seattle, in August 1926, formally approved the creation and formation of Ladies Auxiliaries to the Fraternal Order of Eagles,

WHEREAS: From 1898 to 1926, the Fraternal Order of Eagles were bachelors, with the formation of the Ladies Auxiliary, we became a ***FAMILY***.

WHEREAS: In the last 72 years, since the family was formed, we have worked together to become the greatest Fraternal Organization in the world today.

WHEREAS: Over the years the Auxiliary Sisters have worked side by side with the Aerie Brothers to help make their local Aeries prosper.

WHEREAS: Since their formation, the Auxiliary has been the backbone of our Eagles Youth Groups, and family involvement in the local Aeries.

WHEREAS: We know if it wasn't for the Auxiliaries, our fund-raising projects for the Eagle charities and the helping of our communities when needed would be 20 percent of what it is now.

WHEREAS: Over the last 72 years we have come to realize what must be present to have a successful Eagles Club. When the Aerie and Auxiliary work together to make the family grow, with new members and creating activities for the family, the Club will be successful.

WHEREAS: We also know that the Fraternal Order of Eagles is not unlike the human body, with the head being the Grand Aerie and Grand Auxiliary; the arms are the State Aerie and auxiliary; the torso represents all the

individual Aeries and Auxiliaries; **and the most important are the legs for one is the Auxiliary Sisters and the other is the Aerie Brothers. If you weaken either one you will fall!**

THEREFORE: In our opinion, promoting ladies to join the Aerie is promoting the destruction of the **Family and the Fraternal Order of Eagles.**

THEREFORE: In our opinion, Article 1, Sections 1 and 2, and Article III, Sections 1 through 14 of the Constitution and Statutes is the basis of the Fraternal Order of Eagles.

THEREFORE: We believe that any opinions rendered by the Grand Tribunal that are in direct conflict with the Constitution and Statutes will be presented to the Grand Aerie at their Annual Convention before they are published.

(EXPLANATION TO THE LAST PARAGRAPH: an opinion made by the Grand Tribunal on a section of the Constitution and Statutes must be germane to the Section. If it changes the context of the section it is not an opinion, it is an amendment to our Constitution and Statutes and must be filed with the Grand Secretary, at least 30 days prior to their Annual Convention, and voted on by the Delegates)

(POINT OF ORDER: In the latest edition of the Articles of Incorporation Constitution and Statutes, it states the word Brother and the word **Male be deemed without Gender, Webster's Collegiate Dictionary defines Brother as a Male person considered in his relation to another person; having the same parents, Definition of Male: Designating, or of pertaining to a**

man or human being of the sex which begets young, Definition of Begets: to procreate as a father or sire.)

THEREFORE: We do not believe anyone has the authority or power to change or make an opinion on the Laws of Nature.

THEREFORE: After all that has been stated above, we believe that a Male Is a Man, a Female is Woman, a Man is a Brother, a Woman is a Sister; a Brother belongs to the Aerie, a Sister belongs to the Auxiliary, and this makes a Family. Put it all together and you have the *Fraternal Order of Eagles!!*"

THEREFORE: We, as Brothers of Chehalis Aerie No. 1550, will support and, if necessary, fight for our Ladies Auxiliary. After 72 years of working side by side with us, they deserve our utmost respect and loyalty.

We will discuss some of the reasons of the Resolutions Committee on that tomorrow. (Applause.)

I had to read that one because there has been a lot of discussion.

We got a resolution about Grand Aerie officers and employees and that. This is under the direction of the Board of Grand Trustees, and we kind of think that that should be their job.

We have a resolution from Riverton Aerie No. 3036. It's a constitutional change about voting on your election – voting for one or voting for two. Here again, it's a constitutional change.

We have a resolution from Montana State aerie regarding the ladies per capita tax, which is $5 per year,

and the men's is $4 per year. We're informed by the Grand Board of Trustees – or the fiscal agent will read that this is the cost of running the auxiliary expenses, the amount of $5 per Auxiliary member and this is why the per capita tax is $5 for the ladies and $4 for the men.

We have another constitutional change from Wenatchee, Washington Aerie about the mediator and the prosecutor. I think that has been brought up in the Judiciary Committee.

My Brothers, that is my report for today. Tomorrow, we will be voting on the ones that have been presented and if any of you do want to discuss with the Resolution Committee, we will be available after this meeting in the music room. Thank you.

GRAND WORTHY PRESIDENT WILLIAM BLUM: Thank you, my Brothers, for your indulgence. Next, I'm going to call to this microphone Past Grand Worthy President Brother Lew Reed for a report of the Financial Advisor.

PAST GRAND WORTHY PRESIDENT LEWIS "LEW" REED: Thank you, Grand Worthy President Bill, Good morning, my Brothers. This is the Financial Advisor's Report for this year. It has been my pleasure to serve as Financial Advisor since 1986. Section 19.1, Statutes, F.O.E. states: "The Financial Advisor shall give to the Grand Aerie, its departments and several State, Provincial and local Aeries such *advice* and *assistance* as may be necessary for the proper conservation, management and investment of their funds and shall perform such other duties as are prescribed by the laws of the Order or as may be required of him by the Board of Grand Trustees."

As Financial Advisor, it is my responsibility and duty to provide the Grand Trustees with suggestions and information necessary for them to make reasonable decisions in meeting their fiduciary responsibilities as Trustees. This includes operating cost reduction suggestions.

In order to compete in today's world, the Eagles, like other corporations, must continually search for ways to improve as well as reduce operational expenses.

During the last several years, there has been a dramatic improvement in the financial status of the Grand Aerie. This accomplishment is due, in part, to the following actions taken since 1990:

- The number of full-time employees has been reduced by 27, from 94 to 67 in just a few years.
- The reduction of the number of lock boxes.
- Changing lease vendors for copiers.
- Main frame NCR computer upgrade.
- Employees paying part of health insurance premium.
- Negotiations for discounts from vendors.
- All overtime pay eliminated in the Milwaukee office and a great deal eliminated in the Columbus office.
- Bidding process for purchasing office supplies.
- Reduction in printing and mailing costs.
- The new membership system which integrates the accounting and membership system.

- Desktop publishing.
- New computer system is 90 percent completed and will generate considerable savings. The year 2000 problems has been handled with the completion of this new system.
- In cooperation with the Grand Trustees, the financial officers, department heads, and Grand Aerie employees have contributed immensely towards generating these savings.
- The financial status of the Grand Aerie is in excellent condition.
- During the past several years, many organizations such as the F.O.E. have experienced a decline in membership. Some have suffered severe losses.
- The F.O.E. has experienced a net gain of membership each year from 1963 through November 30, 1996.
- Between December 1, 1996, and November 30, 1997, the records reflect a loss of total membership for the Eagles.

There are may confrontations facing fraternal organizations today. It is not an easy task and the loss does not indicate a crisis, however the trend must be monitored closely by Local, State, Provincial and Grand Aerie leaders and appropriate measures initiated to combat this trend.

There have been ups and downs during the F.O.E.'s 100 years; however, it is my opinion that there have been many, many more peaks than valleys.

Having been a Grand Aerie employee for 28 years during these first 100 years, it has been a challenge but also a pleasure for me.

Being a small part of this 100th Anniversary year has been wonderful! Congratulations to all Eagles for your part in making history during this 100th year. God bless you all.

Grand Worthy President, I move the adoption of this Financial Advisor Report for 1997-1998.

GRAND WORTHY PRESIDENT WILLIAM BLUM: Thank you, Brother Lew. Do we have a second?

BROTHER JEFFREY CAMPBELL: Grand Worthy President, Jeff Campbell, Aerie No. 565, Portland, Maine seconds the motion.

GRAND WORTHY PRESIDENT WILLIAM BLUM: You have heard the motion. You have a question? Somebody come for a question? Okay. All in favor, use your voting sign.

Down hands.

Those opposed, same sign.

Motion carried.

At this time it's my pleasure to call to this microphone for a Report of the REAC, Brother Bill Hatten from Houston, Texas.

BROTHER BILL HATTEN (Houston, Texas Aerie No. 63): Grand Worthy President and my Brothers, I have in my had my report so you don't need to worry. REAC is well and alive. During the past year, we have organized

several new REAC clubs. The reports from those who have REAC is that it is serving a very important purpose. As our membership grows older, REAC becomes more important.

For those of you who do not have a REAC club, I would recommend to you that you contact the program department. They have a wonderful program there that they will send you out the material necessary, and I promise you that it will not take over the Aerie. It will serve a real purpose.

This year, we are going to have a luncheon at 1:30 at the Spokane Aerie No. 2's home in Spokane. At 1:30, all of you are invited. I know that all of you have already bought your tickets so I'm not worried about an overflow. But we would like to have a good crowd. I understand some 250 tickets have been sold.

We do want to dedicate this Convention in our luncheon this afternoon to Phyllis Morris, who gave many, many years of her life to the Eagles as secretary to Bob Hansen, and was certainly the guiding light to REAC.

And so I make this the report and ask the adoption of the REAC Committee. Thank you, Worthy President.

GRAND WORTHY PRESIDENT WILLIAM BLUM: My Brothers, you have heard the motion. Do we have a second?

BROTHER DAVID WILHELM: Grand Worthy President, David Wilhelm of LaCrosse Aerie 1254, I second it.

GRAND WORTHY PRESIDENT WILLIAM BLUM: Thank you, my Brother. Is there a question? You have heard the motion, all those in favor, use your voting sign.

Down hands.

Those opposed, same sign.

Motion is carried.

We have some announcements by Brother Bob Wahls, Grand Secretary.

GRAND SECRETARY ROBERT WAHLS: Thank you, Brother Bill. I would like to mention that we had some checks turned in late, they missed the Parade of Checks yesterday. From Bloomington, Illinois No. 527, $104 for Cancer, $338 for Heart.

Happy Hill Aerie No. 1024 from Morris, Illinois: Cancer, $100, Kidney, $100, Heart, $100, and Diabetes, $100.

Now the other Parade of Checks will be – do you have cancer or heart? Because the Jimmy Durante and the Golden Eagle and all those will be today.

There is diabetes for – oh, Anchorage, Alaska, Diabetes Fund, $1,000. The Kidney Fund,

* * *

Auxiliary Class C-2 from Lethbridge, Alberta 2100.

Aerie Class C from Great Falls, Montana Aerie 14.

Field/Drill, 301, Grand Rapids, Michigan, first place Class A.

Class C Field/Drill from Walla Walla, Washington No. 26.

FD-12 from Spokane, Washington Aerie No. 2.

And last but not least, Mixed Class Drill was Spokane, Washington. We had a tie of Aerie 2 and 104.

Congratulations to every one of you. Only other thing I would like to say, most of the results have been picked up. We have a few left in the office. We will be open until noon. anybody that wants to come by and pick up your books, you may do so. Otherwise, they are going to be put in the box to go back to Milwaukee and they will be mailed to you.

I think just before we close, Arnie would just like to finish up with it. Again, thank you for having us this year. Appreciate it.

BROTHER ARNIE BECKER (Jamestown, North Dakota Aerie No. 2337); Grand Worthy President Bill. Thank you, Robin. I, too, want to extend my thank you to all of you good Brothers that judged for us. It is over, and we appreciate everything that you did. We know the conditions weren't quite right, however, you did an outstanding job. We certainly want to again thank the volunteers.

But most of all, I want to bring to the podium this morning, to all of you that are here, to keep in mind and never forget, we only judge by the Grand Aerie rules. That is going to be my statement this morning. We will not deviate. I thank you for being appointed to this position, Brother Bill, and we will not change any program that is not governed by the Board of Trustees, so we go by our rules that you folks get in your book. A lot of you wish to have it changed, you better do a resolution or you better do something because we will not change it on our own behalf. We can't. I thought we should tell you that this

morning once more, to remind you. Grand Aerie rules is how we judge at the Grand Aerie.

And we thank you for your participation and, again, I hope we can be back and do a good job for you next year. Thank you.

BROTHER ROBIN LEE: I would at this time move for the adoption of the Ritual Report.

BROTHER JIM LEGG: Grand Worthy President Bill, Mike No. 3, Jim Legg, St. Cloud, 622, seconds the motion.

GRAND WORTHY PRESIDENT WILLIAM BLUM: Thank you, Brother Jim. My Brothers, you have heard the motion. Is there a question? All in favor, use your voting sign.

Down hands.

Those opposed, same sign.

The motion is carried.

I would like to bring to the podium for an Alzheimer's Report, Brother Dick Steinberg.

BROTHER DICK STEINBERG: Good morning, Brother Bill. This is an updated report of the states and the latest results. Number one was Illinois, $74,653.26. Thank you, Illinois. (Applause.)

Number two was Ohio, $70,270.04, Thank you, Ohio.

Number 3, Iowa, $63,155. Thank you, Iowa.

Michigan, $48,551.33. Thank you, Michigan.

Indiana, $34,302.46. Thank you, Indiana.

Washington, $31,779.93. Thank you, Washington.

Florida, $24,090.05. Thank you, Florida.

California, $21,909.68. Thank you, California.

Missouri, $16,327.04. Thank you, Missouri.

Minnesota, $13,484.89. Thank you, Minnesota.

And Nebraska was number 11, $13,461.76. Thank you one and all. (Applause.)

I move for adoption of that final report.

BROTHER JIM MANKA: Grand Worthy President Bill, No. 3, Jim Manka from Auburn Aerie 2298, seconds the motion.

GRAND WORTHY PRESIDENT WILLIAM BLUM: Thank you. My Brothers, you've heard the motion. Is there a question? All those in favor, use your voting sign.

Down hands.

Those opposed same sign.

The motion is carried.

BROTHER JIM MANKA: Grand Worthy President, on Microphone 3, Jim Manka, Auburn Aerie 2298. I would like to make an announcement to our Brothers, which will take a minute and a half, about the Alzheimer's. About three months ago, there was a young man that was initiated into the Eagles at Auburn Aerie 2298. In his family, as many in this room have had, people very dear to them die or have the affliction of Alzheimer's. The Brother's name is Don Stevenson. He left approximately a month and a half ago to walk across the United States for a charity that we have, Alzheimer's.

The Grand Aerie knows of this. He should be through the state of Montana by now. He has received some backing from one of the top shoe manufacturer's and they have

promised, Nike has, promised him all the shoes he will need to walk across for Alzheimer's.

And the Eagles lodges that he has visited have treated him greatly, and I want to thank you for all my Brothers from Washington, and especially the one from Auburn.

And on his time – on his march, if you see him, pat him on the back, because he's doing it out of his heart and for this problem. Thank you.

GRAND WORTHY PRESIDENT WILLIAM BLUM: Thank you, Brother Jim, My Brothers, I'm going to call to the microphone, Chief Justice Mike Lagervall from Ballard 172 for the Report of the Grand Tribunal.

BROTHER MIKE LAGARVALL: Good morning, my Brothers. Grand Worthy President, Grand Aerie Officers and Grand aerie Delegates to the 100th Convention. I'm going to give my Chief Justice Report in just a second, but one order of action has to be given before I give my report. So listen up, my Brothers. I am Mike Lagervall, Chief Justice of the Grand Tribunal from Ballard Aerie No. 172 from the great state of Washington.

This is a Grand Tribunal Order given July 30, 1998. "Given that the Delegates to the 1998 Grand Aerie Convention have voted overwhelmingly to decline to substitute the word 'person' for 'male' in Section 70.2 of the Statutes, Grand Tribunal Opinion No. 750 is hereby withdrawn."

(Standing ovation.)

Thank you, my Brothers. The following is presented as the annual report of the Grand Tribunal Fraternal Order of Eagles for the year ending 1997-1998 to the delegates assembled for the 100th Annual Convention of the Grand Aerie/Grand Auxiliary International Convention in Spokane, Washington, July 27, 28, 29 and 30, 1998.

During this year just completed, the Grand Tribunal issued the following formal Judgments:

- 5 Original Cases with 1 pending.
- 12 requested formal Opinions.
- 112 Appeal Cases were opened (Nos. 1534-1625).
- Of the 112 Appeals, 23 were Summary Appeals.

The Grand Tribunal held several hearings throughout 1997-1998. One was in Jeffersonville, Indiana, on November 8, 1997, regarding the Appeal of the Executive Order for the Charter Suspension of Aerie No. 1527; another hearing was held in Santa Barbara, California, on January 5, 1998, regarding the appeal of the Executive Order for the Charter Suspension of Aerie No. 442; in addition, a hearing was held in Santa Fe, New Mexico, on January 19, 1998, regarding unresolved charges filed by Auxiliary No. 2811. Also, a hearing was held in Arnold, Missouri, on March 8, 1998, regarding the Appeal of the Executive Order of the Grand Worthy President suspending the Charter of Auxiliary No. 3678; and lastly, a hearing was held in Portland, Oregon, on July 2, 1998, regarding the Appeal of the Executive Order of the Grand Worthy President suspending the Charter of Aerie No. 2089, Bend, Oregon.

The Mediation Laws adopted at the 1988 Grand Aerie Convention recognizes that we are a fraternal organization founded on the fundamental principles of liberty, truth, justice and equality. The Grand Tribunal recommends that in keeping with the spirit of fraternalism both the Aeries and Auxiliaries are encouraged to make better use of the Mediation process. It also recognizes that in federal, state and local court systems, there are procedures for the parties to settle their disputes without going to

trial. Mediation Guidelines are available at the Grand Tribunal office upon request.

The Grand Tribunal has also revised certain annotations to the Constitution and Statutes in an effort to make these resources more "user friendly."

The Grand Tribunal respectfully requests that all the offices of the Fraternal Order of Eagles at the Local, State, and Provincial and Grand Aerie levels make every effort to comply and familiarize themselves with the Constitution and Statutes as revised. For easy reference, annotations to the Constitution and Statutes are inserted directly under the section of law to which they pertain.

In addition to the formal cases that we've heard, we've had over 2,550 inquiries by way of correspondence requesting information and various rulings and many telephone conversations from officers and members of Local, State, and Provincial Aeries and auxiliaries, as well as Grand Aerie Officers and Grand Aerie Department heads.

Meetings of the Grand Tribunal were held at the 1997 Grand Aerie convention in Indianapolis, Indiana, July 28, 29, 30 and 31, 1997; also in Milwaukee, Wisconsin on October 2, 3, 4 and 5, 1997, and in San Diego, California, on January 22, 23, 24 and 25, 1998.

In addition, when necessary, the Grand Tribunal transacted business conducted via several conference telephone calls and had an orientation meeting at the October meeting in Milwaukee,

* * *

Honorable Richard A. Strophy
Noted for Hearing: 1/14/99
(Pursuant to Stipulation On
Amended Scheduling Order
dated 11/4/99)

SUPERIOR COURT OF WASHINGTON FOR
THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; and ALICE F. VASSAR, Plaintiffs, vs. GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES and FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	NO. 99 2 01214 1 AFFIDAVIT OF JOHN W. WIDELL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
STATE OF WASHINGTON COUNTY OF KING	ss.

JOHN W. WIDELL, being duly sworn, states:

1. I am attorney of record for the Grand Aerie, Fraternal Order of Eagles.

2. The Fraternal Order of Eagles was organized as a fraternal organization in 1898 and has continuously been a fraternal organization since that time.

3. The Fraternal Order of Eagles is recognized by state, local, and federal government officials as a fraternal organization.

4. A true and correct copy of the Articles of Incorporation, Constitution and Statutes of the Grand Aerie, Fraternal Order of Eagles (1997 Edition) is attached to this affidavit as Exhibit A.

5. The Fraternal Order of Eagles conducts its meetings and initiations in accordance with memorized ceremonial rituals. The rituals are not made a part of the public record, but will be made available to the Court under seal if the Court finds it necessary to review them.

6. Discussion or transaction of outside business at Fraternal Order of Eagles meetings is strictly forbidden. The sole purpose of the organization is to allow its members to participate in a social and familial brotherhood.

/s/ John W. Widell
John W. Widell

SUBSCRIBED AND SWORN to before me this 6th day of December, 1999.

[SEAL] /s/ Karen A. Benedict
(Signature of Notary)

/s/ KAREN A. BENEDICT
(Printed Name)

Notary Public in and for the State of Washington, residing at Bellevue
My Commission expires 3-1-01

EXHIBIT A

* * *

Articles of Incorporation
of the
Fraternal Order of Eagles

KNOW ALL MEN BY THESE PRESENTS: That we, John Cort, Harry Leavitt, John Considine, Thomas J. Considine, Mose Goldsmith, Arthur G. Williams, Melvin G. Winstock, Horace E. Merkle, L.C. Brown, citizens of the United States of America and the State of Washington, do, for the purpose of creating a body politic and incorporating under and by virtue of the Constitution and Laws of the State of Washington, hereby adopt and execute in triplicate the following:

ARTICLES OF INCORPORATION

(I)

The name of this association and corporation shall be the GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES.

(II)

The objects for which the Fraternal Order of Eagles is formed and shall exist are:

To unite fraternally for the mutual benefit, protection, improvement and social enjoyment, all persons as it, by its Constitution, Laws, Rituals, By-Laws, and other forms or rules and regulations, may from time to time provide, and to make its members and Subordinate bodies or units subject thereto;

To issue and revoke Charters, or other evidences of organization and formation of Subordinate, State, District and Provincial Aeries and Ladies Auxiliaries, or any such other units as it may from time to time charter, form or organize, no matter by what name the same may be know or called;

To enact, promulgate, amend or repeal, or provide for the enactment, promulgation, amendment or repeal of, Constitution, Laws, Rituals, By-Laws, rules and regulations, or any other form of legislation, for the Government of the Grand Aerie, its Subordinate Aeries, Ladies Auxiliaries, State, District and Provincial Aeries, or any such other units and members thereof, as it may from time to time charter, form or admit, no matter by what name the same may be known or called;

To establish and maintain an insurance department under the control of a Board of Directors who shall prepare and promulgate certificates of insurance and provisions for death, old age disability and other benefits payable as provided for in the Laws of the Grand Aerie enacted for the government and administration of the insurance department; and,

To do any and all things necessary and incident to the development, progress, growth and welfare of the Grand Aerie, or any of its Subordinate units or bodies, or members thereof, and to do and perform any and all other things as may be generally performed by a fraternal beneficiary society.

(III)

The number of Trustees who shall manage the concern of this Company for the first six (6) months after the filing of these Articles of Incorporation shall be John Cort, Harry Leavitt, John Considine, Thomas J. Considine, Mose Goldsmith, Arthur G. Williams, Melvin G. Winstock, Horace E. Merkle, L. C. Brown.

(IV)

The principal place of business of this association shall be at Seattle, King County, State of Washington.

The above was duly signed and acknowledged by the Incorporators on the 29th day of April, 1898, and filed in the office of the Secretary of State, of the State of Washington, on May 13, 1898, and was duly amended on September 13, 1948.

Official Symbols

The official emblem of the Fraternal Order of Eagles shall be the Attacking American Eagle.

The Official Flags of the Fraternal Order of Eagles shall be the Flag of the nation in which the Aerie is located; crossed by the Flags of the other sister nations.

The official standard of the Fraternal Order of Eagles shall be the representation of the official insignia of the Order superimposed on a white field bordered with gold fringe.

The official colors of the Fraternal Order of Eagles shall be red, white and blue.

The official insignia of the Fraternal Order of Eagles shall be an attacking American Eagle superimposed on a circular shield which shall display the words "Liberty, Truth, Justice, and Equality" along its circumference, and beneath which shall be displayed the letters "F.O.E."

The official Seal of the Grand Aerie shall consist of a circle within a circle. On the inner circle shall appear the likeness of an Eagle with wings spread with the letters "F.O.E." above and the words "Organized Feb. 6, 1898" underneath. Between the inner and outer circles shall appear the words "Fraternal Order of Eagles Grand Aerie."

Constitution of the Fraternal Order of Eagles

PREAMBLE

To unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality, to perpetuate itself as a fraternal organization and to provide for its government as its Constitution, Laws, Rituals, By-Laws or other rules and regulations may from time to time provide, and to promote the general

welfare, the Fraternal Order of Eagles ordains this Constitution.

To promote and raise funds for duly authorized Fraternal Order of Eagles charities and contribute to worthwhile charitable causes.

ARTICLE I

The Supreme Law

Section 1. This Constitution, the Statutes enacted by the Grand Aerie not in conflict therewith, and the Ritual, with instructions therein contained, shall be the Supreme Law of the Fraternal Order of Eagles.

Section 2. The Grand Aerie shall be the governing body of the Fraternal Order of Eagles.

ARTICLE II

Departments of Government

Section 1. The powers of the Grand Aerie shall be divided into three (3) independent coordinate departments, to-wit: legislative, executive and judicial.

ARTICLE III

Legislative Department

Section 1. The legislative power shall be vested in a Grand Aerie, which shall consist of:

(a) All present and future Past Worthy Presidents who are in good standing in their respective Aeries. A Past Worthy President is one who has served his Aerie for a full

year as Worthy President, or one who, during period of war, resigned his office and entered the Military, Naval, Hospital or Marine service of the United States, the Dominion of Canada, the United Kingdom, the Philippine Islands, or the Republic of Mexico, or one who has served the unexpired term of the Worthy President who from any cause failed to complete the term for which he was elected, or one (1) upon whom there has previously been conferred the Honorary rank of Past Worthy President, or the Junior Past Worthy President who was appointed at the time of the institution of a new Aerie, providing he serves to the end of the term for which he was appointed.

NOTE: Adoption of this Statute is retroactive and applies to the office of Junior Past Worthy President as defined therein. (See Section 36.10)

(b) Those who have served their respective Aeries as Secretary for a period of not less than ten (10) years, while they remain in good standing in their Aerie.

(c) Upon request of the Local Aerie the Grand Secretary shall issue a Past Worthy President's Certificate Deceased to be presented to the survivors of a Worthy President who dies while serving as Worthy President in his Local Aerie.

Section 2. Votes in the Grand Aerie shall be allowed as follows:

(a) Each Past Worthy President shall be entitled to one (1) vote in his own name.

(b) Each Ten-Year Secretary, not a Past Worthy President, shall be entitled to one (1) vote in his own name.

(c) Each State or Provincial Aerie shall be entitled to one (1) vote, and an additional vote for each 5,000 members or major fraction thereof. The votes of the State or Provincial Aerie shall be cast by some Past Worthy President or Ten-Year Secretary as its accredited representative.

(d) Each Local Aerie in good standing shall be entitled to one (1) vote for each 100 members or major fraction thereof. The votes of the Local Aerie shall be cast by some Past Worthy President or Ten-Year Secretary as its accredited representative. If no such person is available, the Worthy President of the Local Aerie may be elected as its accredited representative and in such case he may cast the votes of the Local Aerie.

Section 3. A majority of all the legally authorized votes present at any session shall constitute a quorum of the Grand Aerie.

Section 4. The Grand Aerie shall be the judge of the election and qualification of its members. It shall have the power to suspend or expel any of its members, as may be provided by statute. It shall have the power to regulate by statute the eligibility to vote at sessions of the Grand Aerie.

Section 5. The Grand Aerie shall meet annually in regular session. The Grand Worthy President, with the approval of the Board of Grand Trustees shall fix the time and place of holding the regular session.

Section 6. The Grand Aerie shall have the power:

(a) To define the powers and duties of its officers and committees, except as may be fixed by this Constitution.

(b) To define offense by any member or Aerie of the Order, and to prescribe penalties therefor.

(c) To provide for revenue for the Grand Aerie, control its property, and appropriate its funds.

(d) To provide for the creation and institution of State, Provincial and Local Aeries and ladies Auxiliary units, to enact Laws for their government, to adopt rules and regulations for their conduct, and to levy and collect a per capita tax from the Local Aeries and Local Ladies Auxiliaries.

(e) To provide the Ritual of and prescribe the paraphernalia and emblems used in the Order.

(f) To provide by statute for the enforcement of the orders of the Grand Aerie and the Grand Worthy President, and the decrees, judgments and orders of the Grand Tribunal and other tribunals.

(g) To enact all statutes which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the Order, or of any departments or officers thereof, or such as will preserve the interests or promote the general welfare of the Order and its members.

(h) To act as trustees of funds raised or contributed by the members of Aeries of the Order for charitable purposes, and to control the use and distribution of such funds; and to establish a permanent trust for charitable, educational and benevolent purposes and to provide for accretions thereto, from any source whatsoever, to be held in trust, invested, or administered together with other funds or properties transferred from any source for like

purposes, by the Fraternal Order of Eagles Memorial Foundation.

Section 7. The Grand Aerie may by statute provide for the impeachment and removal from office of any Grand Aerie Officer, and define the offenses for which impeachment may lie.

Section 8. All Laws enacted by the Grand Aerie shall be of general application, and shall be called statutes.

Section 9. Any proposed statute or amendment to a statute shall be submitted in writing and filed in duplicate with the Grand Secretary, at least thirty (30) days prior to the convening of the Grand Aerie, and shall set out in full the proposed statute or amendment; provided, however, that the Grand Aerie may, upon a two-thirds (2/3) vote, receive and act upon any proposed statute or amendment which has not been so filed with the Grand Secretary; provided, further, that committees of the Grand Aerie, and officers, may propose statutes or amendments to statutes without filing the same with the Grand Secretary as hereinbefore provided.

Section 10. A Grand Aerie Officer shall not be convicted and removed on impeachment without a two-thirds (2/3) vote. All other questions except amendments to the Constitution and action upon a proposed statute or amendment to a statute wherein the thirty (30) day clause of Article III, Section 9, has not been complied with, shall be decided by a majority vote.

Section 11. Upon the demand of not less than fifty (50) members, a roll call vote may be ordered on any

question, and entered upon the minutes of the Grand Aerie session.

Section 12. There shall be no degrees of membership in the Order.

Section 13. The Grand Aerie shall keep a journal of its proceedings, which shall be published and distributed in such manner as the Grand Aerie may provide.

Section 14. Local Aeries in any State or Province may organize and maintain a State or Provincial Aerie, composed of Aeries in that State or Province or combinations thereof, as may be provided by statute. Once organized, it shall be mandatory upon a Local Aerie to become a member of and maintain membership in such State or Provincial Aerie, and the Local Aerie shall thereafter at all times be subject to the Constitution and By-Laws of such State or Provincial Aerie. Before they shall become effective the Constitution and By-Laws of each State or Provincial Aerie shall be approved by the Grand Aerie.

ARTICLE IV

Executive Department

Section 1. The Executive power shall be vested in the Grand Worthy President and the Board of Grand Trustees.

Section 2. In case of the removal of the Grand Worthy President from office, or of his death, resignation or inability to discharge the powers and duties of his office, the same shall devolve upon the other officers named in Article VI, Section 1, in the order named therein.

Section 3. The Grand Worthy President, with the consent of the Board of Grand Trustees, shall appoint all standing committees, and all special committees when the statute, motion, or resolution authorizing their appointment, does not otherwise provide.

Section 4. The Grand Worthy President shall have power to fill vacancies in offices, with the consent of the Board of Grand Trustees, and such appointees shall serve through the next annual session of the Grand Aerie, and thereafter for the unexpired term.

Section 5. The Grand Worthy President shall have general supervisory power over all other Officers of the Grand Aerie, shall have access to all books, papers, documents, and letters of any other officers, or any officer of any Local Aerie, and may require from either a report in writing as to any matter within his knowledge.

Section 6. The Grand Worthy President, at the annual sessions of the Grand Aerie shall make a report of his official acts and general condition of the Grand Aerie, and make such recommendations as he may deem proper for the information of the Grand Aerie.

Section 7. The Grand Worthy President shall have power to institute State, Provincial and Local Aeries and Ladies Auxiliaries, as provided by statute.

Section 8. The Grand Worthy President may appoint Deputy Grand Worthy Presidents, as may be provided by statute.

Section 9. The Grand Worthy President shall have power, by and with the consent of a majority of the Board of Grand Trustees, to suspend for violation of law, or for other good cause, any officers of the Grand Aerie, and

revoke or suspend the charter of any State, Provincial or Local Aerie or Ladies Auxiliary.

Section 10. The Grand Worthy President shall have the power to convene a Local Aerie in special session. He shall in such case, transmit to the Secretary of such Local Aerie, a written order directing him forthwith to notify all members of the Local Aerie of the time and place of such meeting which shall not be less than five (5) days from the date when the order should be received by the Secretary in the ordinary course of mail. Such order shall specify the matter to be considered. Upon convening of the Local Aerie, the Grand Worthy President or his duly appointed deputy shall have the right to take up the matter referred to.

Section 11. It shall be the duty of the Grand Worthy President to enforce the Laws of the Order, the decrees, judgments and orders of the Grand Tribunal, and to protect and defend the Order, and he is vested with all power necessary for the performance of such duty.

Section 12. The Board of Grand Trustees shall have general authority, control and supervision over all fiscal affairs, funds, property, securities, investments, purchases and employment of the Order, shall supervise the basic major policies and the Ritual of the Order; shall supervise and regulate the administration of officers' and employees' fidelity bonds, other than their own; shall fix the compensation of officers and employees of the Grand Aerie other than their own; and generally shall have supervision, control and management over all departments of the Order as may be created by statute and as have not been specifically delegated to the Grand Worthy President, and

shall perform such other duties as may be required by statute.

Section 13. The compensation of the Board of Grand Trustees, and the amount and custody of their fidelity bonds, shall be fixed by statute.

Section 14. The Board of Grand Trustees shall report, in writing, to the Grand Aerie at each session thereof, such report giving a true and complete statement of the affairs of the Grand Aerie and of the business which such Board has transacted since its last report.

Section 15. The Chairman of the Board of Grand Trustees may, and upon request of three (3) members thereof, shall call meetings at such times and at such places as may be deemed necessary, timely notice thereof to be given to all members of the Board. The Grand Worthy President may attend all meetings, but in no event shall be entitled to vote.

Section 16. A majority of the Board of Grand Trustees shall constitute a quorum.

Section 17. In the interim between called meetings, the Board of Grand Trustees and its members shall act and vote in writing through the government mails. The Secretary of the Board shall record all such actions in the Board's minutes.

ARTICLE V

Judicial Department

Section 1. The judicial power shall be vested in a Grand Tribunal.

There shall also be created such other tribunals as the Grand Aerie shall establish by statute. The decisions of the Supreme Court of the United States construing the words "judicial powers," as used in the Constitution of the United States, shall be binding upon the Grand Tribunal in construing the words "judicial powers" herein.

Section 2. The Grand Tribunal shall consist of five (5) members who shall be called Grand Justices, one (1) of whom shall be elected as the Chief Justice by the Justices. The term of office shall be three (3) years each and until their successors have been appointed and qualified. Thereafter, at the expiration of each Grand Aerie Session, the Grand Worthy President shall appoint with the consent of the Board of Trustees, Grand Justices as required by expiration of office or to fill vacancies, provided that no more than two (2) Grand Justices shall be appointed at the expiration of any Grand Aerie Session.

Section 3. The Grand Tribunal shall hold its sessions at times and at places to be determined by it, unless otherwise provided by statute.

Section 4. Appellate jurisdiction over judgments rendered by other tribunals, and original jurisdiction in all other matters, shall be vested in the Grand Tribunal.

Section 5. The Grand Tribunal shall review and determine errors of Law occurring in connection with any trial held by any other tribunal, including the question of whether there was sufficient evidence to sustain the findings of fact, and shall affirm, modify or reverse the decision, or remand the same for a new trial or other proceedings in accordance with the opinion. Provided, however, that the Grand Worthy President, when he deems it for the good of the Order, may take an appeal

from any other tribunal to the Grand Tribunal, for a retrial of the case upon all its merits by the Grand Tribunal. A decision of any other tribunal shall be enforced pending appeal, unless stayed or suspended by order of one (1) of the Grand Justices.

Section 6. The Grand Tribunal shall prescribe rules of practice and procedure for the Tribunals of the Order not prescribed by statute.

Section 7. All decisions of the Grand Tribunal shall be in writing, and shall be filed with the Secretary of the Grand Tribunal. The Grand Tribunal shall be charged with the duty of annotating the Constitution and Statutes of the Order, and of distributing the Constitution, Statutes and annotations to the officers and Aeries of the Order.

Section 8. The Grand Worthy President shall have power to grant pardons and commute sentences in case of members convicted of offenses against the Laws of the Order, subject to the approval of the Board of Grand Trustees.

ARTICLE VI

Officers

Section 1. The Officers of the Grand Aerie shall be:

The Junior Past Grand Worthy President
The Grand Worthy President
The Grand Worthy President-Elect
The Grand Worthy Vice-President
The Grand Worthy Chaplain
The Grand Secretary
The Grand Treasurer
The Grand Worthy Conductor

The Grand Inside Guard
The Grand Outside Guard
The Grand Trustees
The Grand Justice

Section 2. The Grand Worthy President-Elect, the Grand Worthy Vice-President, the Grand Worthy Chaplain, the Grand Worthy Conductor, the Grand Secretary, the Grand Treasurer, the Grand Inside Guard, and the Grand Outside Guard shall be elected annually by the Grand Aerie, and shall hold office until their successors have been elected and qualified. The Board of Grand Trustees shall consist of five members, the Chairman of whom shall be the Junior Past Grand Worthy President, who shall hold office by virtue of his position; the other four members shall be elected annually, and shall hold office until their successors have been elected and qualified. The Grand Aerie may create other offices by statute, and provide by statute the method of filling the same.

Section 3. Upon completion of the term of the Grand Worthy President, the Grand Worthy President-Elect, who has served his term as Grand Worthy President-Elect, shall succeed to the office of the Grand Worthy President without further confirmation by election in order to attain that office.

* * *

TITLE III

LOCAL AERIES

ORGANIZATION AND PROCEDURE

MEMBERSHIP

Section 70.1 Every applicant for membership in any Local Aerie shall be recommended by two (2) members of the Order.

Section 70.2. No person shall be eligible to be elected to membership in any Local Aerie unless such person is a male, is of good moral character, and believes in the existence of a Supreme Being, is not a member of any other Local Aerie of the Fraternal Order of Eagles, and unless he is over twenty-one (21) years of age; provided, however, that an Aerie may provide in its By-Laws for the admission of members between the ages of eighteen (18) and twenty-one (21) years, and in such case the official receipt issued to such members shall have endorsed thereon in large letters the words "Under twenty-one years of age". Nor shall any person, under any circumstances, be eligible to be elected to membership in any Local Aerie if he is a member of or in any way connected or affiliated with the Communist Party, or who believes in or advocates the overthrow of the Governments of the United States, Canada, the Philippines, the Republic of Mexico, or the United Kingdom by force or violence.

> Art VII, Sec. 8, states: Each Local Aerie shall be the sole judge of the persons who may be admitted as guests or members.
>
> The proper procedure to handle an initiated member who gave false information in a membership application is for a member, in good standing of the Order, to file charges against the

initiated member. The issue raised by these charges can then be determined by the Trial Committee. Should the Trial Committee determine that the application for membership contained false information, it would be their ruling to determine whether the member should be expelled from the Order. (Opinion No. 462)

Expulsion of a member from an Aerie, be it his Home or Dual Aerie, expels the member from both Aeries. (Opinion No. 584-A)

An approved applicant for membership who has not yet been initiated is a member of the general public. All members of the general public who are guests in the buffet and social rooms are bound by the House Rules.

Violation of these laws and rules are just cause for an approved applicant to have his application be rejected and all monies paid by him are to be refunded via registered or certified mail. (Opinion No. 631)

Section 70.3. (a) Notwithstanding any provisions in the Statutes to the contrary, any member in good standing in a Local Aerie who desires to become affiliated with a second Aerie and retain his membership in his own Local Aerie, may present his application for such affiliation as a dual member in the form required by the second Aerie.

(b) Notwithstanding any provisions in the Statutes to the contrary, any member in good standing in a Local Aerie whose place of residence is closer to the location of a new Aerie being organized than the Aerie of which he is a member, may, upon application and payment of the required Charter fee and dues, become a Charter member

of the new Aerie and hold dual membership in the new Aerie under the existing Laws covering dual membership.

> The Statute attaches the right to dual membership to location of residence, therefore, only one (1) dual membership is allowed. A member cannot be a dual member in more than one (1) Aerie. (Opinion No. 514)

Section 70.4. Such application shall be accompanied by a receipt showing dues paid in advance for at least one (1) year in the Local Aerie in which the applicant is presently a member.

(a) No initiation fee shall be required in connection with such application, and no sum shall be due the Grand Aerie from any Local Aerie by reason of its accepting such application.

(b) No transfer fee shall be required of the applicant member.

(c) The Local Aerie shall investigate and vote upon such application in the manner required by Law for other applications.

Section 70.5. If accepted for membership by the second Local Aerie, upon election the member shall thenceforth be a member in both his original Local Aerie and the second Local Aerie, including the right to hold office, except that he shall not hold office simultaneously in both Aeries, and except that he shall not receive any benefits from the second Local Aerie.

(a) The membership card issued by the second Local Aerie shall in no event be issued for a period longer than the period for which the member has paid his dues in

advance in his original Local Aerie. All renewal membership cards shall likewise be issued in this manner.

(b) The dues of the member in the second Local Aerie shall be an amount as determined by the Aerie, except that in no event shall the dues be less than six dollars ($6.00) per year, nor more than the regular non-beneficial dues for other members.

(c) No initiation of such member shall be required.

Once a Past Worthy President, whether by a dual Aerie or otherwise, such member is a Past Worthy President in any and all Aeries the member may properly hold membership in, except where the member lost such title or designation because the member has been expelled or resigned. (Opinion No. 592-B)

Section 70.6. Such membership in the second Local Aerie shall cease:

(a) Upon failure to pay dues in the second Local Aerie.

(b) Upon failure to maintain membership in the original Local Aerie.

(c) Upon the member removing his residence from the jurisdiction of the second Local Aerie.

(d) Upon membership, in either Local Aerie, being terminated as otherwise provided by Law.

> Where a dual member terminates his membership in his second Aerie by resignation of such dual membership only, and in accordance with the provisions of Section 75.1, Statutes, such resignation does not affect his membership in his original Local Aerie. (Opinion No. 281)

The dual membership of a Charter member in a second Aerie shall cease upon failure to maintain membership in his original Local Aerie or upon failure to pay dues in the second Local Aerie. (Opinion No. 286)

Section 70.7. No per capita tax shall be paid to the Grand Aerie by the second Local Aerie upon members affiliating with it pursuant to the provisions of Sections 70.3 to 70.6, inclusive, but reports required by the Grand Aerie shall reflect the number of members upon which no per capita tax is required to be paid.

(a) Per capita tax may be paid by the second Local Aerie to the State or Provincial Aerie with which it is affiliated upon all members affiliating with it, if so provided in the State or Provincial Aerie By-Laws.

(b) *The Eagle Magazine* shall be sent to such member only through his membership in his original Local Aerie.

Section 70.8. All provisions of the Statutes inconsistent with the provisions of Section 36.1, Sections 70.3 to 70.5, inclusive, are hereby suspended insofar as they are inconsistent, the intentions of Section 36.1, Sections 70.3 to 70.7, inclusive, being hereby declared to be to add additional provisions to the Statutes to cover dual memberships only, such dual membership being limited to two (2) Local Aeries at any one (1) time.

Section 70.9. Any applicant for membership recommended by two (2) members of the Order and who meets all eligibility requirements may have his application for membership considered by any Local Aerie.

Section 70.10. Each person desiring to become a member of an Aerie must properly fill out and sign an application therefor on a form prescribed by the Grand Aerie. Before an applicant may be admitted as a benefit member, as in the Laws provided, he shall fill out and sign a certificate, known as a Declaration of Physical Condition, in the form required.

Sections 70.10, 70.11 and 70.12 of the Statutes, apply regardless of who the applicant is. The Secretary, Interviewing Committee and the Aerie must act in accordance with those Statutes. These Statutes are founded in the fundamental policy of the Fraternal Order of Eagles, which is to allow the Local Aeries to judge the qualifications of their members under Article VII, Section 8, of the Constitution.

In the event that a person is approved for membership by a vote of the Aerie, or has been initiated when not eligible for membership under the Constitution and Statutes of our Order, it is any member's right to challenge the approval, vote of the aerie and/or the initiation. If the challenge is denied then charges may be filed against those who have violated the Constitution and Statutes. (Opinion No. 636)

Section 70.11. all applications for membership, together with any Declaration of Physical Condition submitted by the applicant, shall be referred to the Interviewing Committee. It shall be the duty of such Committee to interview said applicant not more than sixty (60) days after the receipt of the application, after due notice to the applicant by the Secretary by mail of the time and place of interview.

The Interviewing Committee is required to report its findings and recommendations whether favorable or not favorable, to the Aerie which then proceeds to vote to elect or reject the applicant. The Interviewing Committee would not be authorized to withdraw the application or withhold the submission of its report to the Aerie, if it finds the applicant to be unfavorable. Such withdrawal could only be effected by the proposer, provided such action is taken prior to the submission of the report of the Interviewing Committee to the Aerie. (Opinion No. 17)

An application for membership must be read at an Aerie meeting following its receipt with the required fee, before reference to the Interviewing Committee. (Opinion No. 232)

Section 70.12. After the report of the Interviewing Committee is submitted, the applicant shall be voted upon. All Local Aerie candidates for membership **shall be elected by majority vote of those members present and voting by secret ballot.** If elected, the Aerie may proceed with the initiation of the applicant **in accordance with the Ritual**. Any applicant for membership who is balloted on and is declared rejected shall not be proposed again for a period of six (6) months, but the Worthy President may, if in his judgment the interests of the Order so demand, allow a second ballot to such applicant, which shall be taken immediately after the first ballot and before any other business shall have intervened.

The Worthy President has the right to allow an additional ballot to an candidate who is rejected before any subsequent business is conducted. (Opinion No. 656)

The Local Aerie determines the qualifications of applicants for membership and votes for (elects) or rejects those applicants.

The Grand Aerie has no role whatsoever in the process of selecting and/or electing members of a Local Aerie. The Grand Aerie has only an administrative function, that is to perform a ministerial duty by accepting into its computer system those persons who are initiated by the Local Aerie as members. **(Opinion No. 731)**

A secret ballot is required when balloting on a new member or members. **(Opinion No. 732)**

The Grand Aerie will impose no restrictions upon membership in the Local Aerie on the basis of gender. (Opinion No. 750)

The application accompanying a Transfer Card as presented by the holder, must be balloted upon as required by the Ritual and may be accepted or rejected by vote in Aerie meeting. (Appeal No. 106)

Section 70.13. An applicant who has been rejected, for any cause, shall not be accepted by any Aerie other than the Aerie to which application for membership was first made, unless such Aerie shall give its written consent thereto.

Article VII, Section 9, Annotated Constitution, Fraternal Order of Eagles, states: Each Local Aerie shall be the sole judge of the persons who may be admitted as guests or members. Absent a Local Aerie By-Law or a specific rejection of the person by the Local Aerie, rejection for membership does not, per se, prohibit the person from being admitted to the social rooms as a guest of a member. The Constitution and Statutes of the

Fraternal Order of Eagles gives to the Local Aerie the authority to control those admitted to its social rooms. Rejection of a person's application for membership has nothing to do with the qualifications for admission to the social rooms. That is a matter for the Local Aerie. (Opinion No. 451)

* * *

THE HONORABLE RICHARD A STROPHY

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; and ALICE F. VASSAR, Plaintiffs, vs. GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES and FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	No. 99 2 01214 1 ANSWER AND DEFENSES (Filed Oct. 14, 1999)

I. *ANSWER*

Defendants Grand Aerie, Fraternal Order of Eagles, and Washington State Aerie, Fraternal Order of Eagles, answer the allegations of plaintiffs' Amended Complaint as follows:

1. ***Introduction***: Defendants deny all allegations, including the allegation that plaintiffs have suffered damages.

2. ***Paragraph 1***: The paragraph contains no allegations of fact and therefore does not require an answer.

3. ***Paragraph 2***: Defendants admit that Tenino Aerie #564, Fraternal Order of Eagles, is a fraternal association located in Tenino, Washington. Defendants deny any and all other allegations in paragraph 2.

4. ***Paragraph 3***: Defendants admit that Whidbey Island Aerie #3418, Fraternal Order of Eagles, is a fraternal association located in Whidbey Island, Washington. Defendants deny any and all other allegations in paragraph 3.

5. ***Paragraph 4***: Defendants are without information sufficient to form a belief as to the truth or falsity of the allegation and therefore deny the allegation.

6. ***Paragraph 5***: Defendants admit that the Grand Aerie, Fraternal Order of Eagles, is a fraternal association and that it was originally incorporated in Seattle, Washington. Defendants admit that the Grand Aerie has a correspondence address in Milwaukee, Wisconsin. Defendants deny any and all other allegations in paragraph 5.

7. ***Paragraph 6***: Defendants admit that the Grand Aerie is a nonprofit fraternal association that promulgates rules and coordinates Local Aeries of the Fraternal Order of Eagles. Defendants admit that the Fraternal Order of Eagles has over 1.6 million members. Defendants deny any and all other allegations in paragraph 6.

8. ***Paragraph 7***: Defendants admit that Washington State Aerie, Fraternal Order of Eagles, coordinates Local Aeries in Washington state. Defendants deny any and all other allegations in paragraph 7.

9. ***Paragraph 8:*** Denied.

10. ***Paragraph 9:*** Defendants admit that the State Aerie makes recommendations regarding Local Aeries. Defendants deny all other allegations in paragraph 9.

11. ***Paragraph 10:*** Defendants admit that Section 70.2 of the Constitution of the Fraternal Order of Eagles contains certain language relating to membership. Defendants deny that plaintiffs' attempt to paraphrase that language is necessarily complete or accurate. Defendants admit that Opinion 750 was issued by the Grand Tribunal and later withdrawn. Defendants deny that plaintiffs' attempt to paraphrase Opinion 750 is necessarily complete or accurate.

12. ***Paragraph 11:*** Defendants are without information sufficient to form a belief as to the truth or falsity of the allegation and therefore deny the allegation.

13. ***Paragraph 12:*** Defendants are without information sufficient to form a belief as to the truth or falsity of the allegation and therefore deny the allegation.

14. ***Paragraph 13:*** Defendants admit the Grand Aerie delegates meet once a year and that during the 1998 meeting, the delegates voted down a proposed amendment to Section 70.2 of the Constitution. Defendants deny that plaintiffs' attempt to paraphrase the amendment is necessarily complete or accurate. Defendants deny all other allegations in paragraph 13.

15. ***Paragraph 14:*** Defendants admit that the Secretary of the Washington State Aerie sent a letter to Local Aeries relating to membership. Defendants deny that plaintiffs' attempts to paraphrase that letter are necessarily complete or accurate.

16. ***Paragraph 15***: Defendants admit that the Secretary of the Grand Aerie sent a letter to Local Aeries relating to membership. Defendants deny that plaintiffs' attempts to paraphrase that letter are necessarily complete or accurate.

17. ***Paragraph 16***: Denied.

18. ***Paragraph 17***: Defendants are without information sufficient to form a belief as to the truth or falsity of the allegation and therefore deny the allegation.

19. ***Paragraph 18***: Defendants admit that Local Aeries are charitable, social, and fraternal groups. Defendants deny all other allegations in paragraph 18.

20. ***Paragraph 19***: Defendants admit that the Grand Aerie collects a per capita tax based on membership dues and coordinates Local Aeries. Defendants deny all other allegations in paragraph 19.

21. ***First Paragraph 20***: Defendants admit that the Grand Aerie, the State Aerie, and the Local Aeries are charitable, social and fraternal organizations. Defendants admit that the Fraternal Order of Eagles contributes to charities. Defendants are without information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 20 and therefore deny all other allegations in paragraph 20.

22. ***First Paragraph 21***: Defendants admit that the Grand Aerie Constitution contains certain language. Defendants deny that plaintiffs' attempts to paraphrase that language are necessarily complete or accurate. Defendants deny all other allegations in paragraph 21.

23. ***Second Paragraph 20***: Defendants admit that the Grand Aerie took action to suspend the charter of Tenino Aerie #564. Defendants deny all other allegations in the second paragraph 20.

24. ***Second Paragraph 21***: Denied.

25. ***First Paragraph 22***: Defendants are without information sufficient to form a belief as to the truth or falsity of the allegation and therefore deny the allegation.

26. ***First Paragraph 23***: Defendants are without information sufficient to form a belief as to the truth or falsity of the allegation regarding admission of women by Whidbey Island Aerie #3418 and therefore deny the allegation. Defendants deny that plaintiffs' have suffered any damages.

27. ***Second Paragraph 22***: Denied.

28. ***Second Paragraph 23***: Denied.

29. ***Paragraph 24***: Denied.

30. ***Paragraph 25***: Denied.

31. ***Paragraph 26***: Denied.

32. ***Paragraph 27***: Denied.

33. Defendants deny that plaintiffs are entitled to the relief they seek or to any other relief.

34. Defendants deny all allegations not expressly admitted in this Answer.

II. *DEFENSES*

Defendants assert the following defenses:

1. Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs' claims are barred by the express exclusion of fraternal organizations from the Washington Law against Discrimination.

3. Plaintiffs' claims are barred by the First Amendment to the United States Constitution.

4. Plaintiffs' claims are barred by plaintiffs' failure to exhaust internal administrative remedies and dispute resolution mechanisms.

5. Plaintiffs' claims are barred because defendants are private organizations.

6. Plaintiffs' claims are barred because the actions as to which plaintiffs complain were not taken by any governmental entity.

7. Plaintiffs' claims are barred by waiver, laches, and or estoppel.

8. Plaintiffs' claims are barred because plaintiffs lack standing.

9. Sections 4, 5, and 7 of Article 1 of the Constitution of the State of Washington bar plaintiffs' claims.

10. Defendants reserve the right to assert additional defenses as information is gathered.

II. *REQUEST FOR RELIEF*

Defendants request the following relief:

1. Dismissal of Plaintiffs' Amended Complaint with prejudice.

2. Judgment in favor of defendants and against plaintiffs for attorney's fees and costs incurred in defending this action.

3. Any other relief the Court deems appropriate.

DATED this *13th* day of October, 1999.

HALL ZANZIG WIDELL PLLC

By /s/ J. W. Widell
John W. Widell
WSB No. 18678
Attorneys for Defendants

THE HONORABLE RICHARD A. STROPHY

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; and ALICE F. VASSAR; WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, vs. GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES and FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	No. 99-2-01214-1 AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES

I. INTRODUCTION

This is an action to declare invalid defendants' policy of excluding women from membership, to prevent defendants from revoking the charter of Fraternal Order of Eagles Tenino Aerie No. 564 ("Aerie 564"), and Fraternal Order of Eagles Whidby Island Aerie No. 3418 ("Aerie 4318"), from rejecting female members, from

taking other action against plaintiffs and to recover damages suffered.

II. PARTIES, JURISDICTION AND VENUE

1. This Court is empowered to grant declaratory and injunctive relief pursuant to Chapter 7.24 RCW and Chapter 7.40 RCW.

2. Plaintiff Aerie 564 is an association whose principal place of business is in Tenino, Washington.

3. Plaintiff Aerie 3418 is an association whose principal place of business is in Whidbey Island, Washington.

4. Plaintiffs Kathleen L. Connor, Lanette Davis, Julia A. Foster, Gayle L. Hartman; Kaycee L. Johnson, Annette Riley, Diane E. Roberts and Alice F. Vassar, are members of Aerie 564 and reside in the State of Washington.

5. Based on the most recently published copy of its "Articles of Incorporation," Exhibit A, defendant the Grand Aerie of the Fraternal Order of Eagles ("Grand Aerie") is an organization incorporated under the laws of the State of Washington with its principal place of business in Seattle. The Grand Aerie currently identifies a post office box in Milwaukee, Wisconsin as its address for correspondence. It is not registered under its full name (Grand Aerie of the Fraternal Order of Eagles) in either Washington or Wisconsin, and countless phone calls to its identified phone number have gone unanswered.

6. Defendant Grand Aerie is a worldwide nonprofit corporation which oversees an association of Local Aeries that have over 1.6 million members. The Grand Aerie does business throughout the State of Washington, including Thurston County.

7. Defendant Fraternal Order of Eagles, Washington State Aerie ("State Aerie") oversees the Local Aeries within Washington State. The State Aerie does business throughout the State of Washington, including Thurston County.

8. Each individual Eagle is a member of a Local Aerie. These Local Aeries are, in turn, members of and chartered by the Grand Aerie which supervises and controls them. Local Aeries are required to adopt a uniform Constitution and Bylaws prescribed by the Grand Aerie.

9. Each Local Area [sic] in Washington State is also part of the State Aerie. The State Aerie interfaces between the Local Aeries and the Grand Aeries. The State Aeries makes recommendations to the Grand Aerie about revocation of the charters of Local Aeries and acts as the agent of the Grand Aerie to conduct such revocations.

III. FACTUAL ALLEGATIONS

10. Section 70.2 of the Constitution of the Grand Aerie and the required local Constitution restrict membership to men by stating: "No person shall be eligible to be elected to membership in any local aerie unless such person is a male." Despite this language, beginning in late 1995, the Grand Aerie permitted Local Aeries to admit women. This change was effected on November

27, 1995, when the judicial arm of the Grand Aerie, called the Grand Tribunal, issued its "Opinion 750" which stated that the use of the word "male" is no longer consistent with prevailing law." The opinion continued "The Grand Aerie will impose no restrictions upon membership in the Local Aerie, on the basis of gender. To the extent that prior opinions . . . are inconsistent herewith, they are expressly overruled."

11. Tenino Aerie 564 received Opinion 750 in early 1996 and soon thereafter voted to admit women as members. Since that time, approximately 56 women have become members of Aerie 564.

12. Whidbey Island Aerie 3418 began to admit women as members in late 1996 due to their understanding that it would be discrimination to prevent women from becoming members.

13. The legislative arm of the Grand Aerie meets once a year during an annual convention in the summer. During its meeting in the summer of 1998, the delegates voted on an amendment to Section 70.2 of the Constitution that would have removed the requirement that members be male. That amendment failed. Local Aeries were not informed of this vote until a letter from the Grand Aerie dated December 30, 1998.

14. On January 3, 1999, the Secretary of the State Aerie informed the Local Aeries that he interpreted the delegates' actions to constitute a withdrawal of the Opinion 750. The secretary's letter also informed Local Aeries that "the proposed of a female applicant is liable to have fraternal charges placed on him, and the Aerie President and Secretary are liable to have charges filed on them if they attempt to process an application for a

female applicant. An Aerie's charter would be placed in jeopardy if an Aerie persists in bringing female applicants into the Aerie." Because the State Aerie has no direct power over Local Aeries, Aerie 564 did not consider the letter to be binding and continued to admit women as members.

15. On March 1, 1999 the Grand Secretary of the Grand Aerie sent all Local Aeries a letter reminding them that Section 70.2 requires applicants to be male and stating that "any application not in compliance [with 70.2] will not be processed by the Grand Aerie."

16. All Local Aeries solicit and recruit dues-paying members on a nonselective, open basis. The membership is neither small nor select. The only requirements that the member be a male who is "of good moral character, and believes in the existence of a supreme being, is not a member of any other local aerie of the Fraternal Order of Eagles, and . . . is over twenty-one (21) years of age."

17. Tenino Aerie 564 currently has over 700 members. Whidbey Island Aerie 3418 has approximately 190 members.

18. Membership in Local Aeries provides social, economic, business and personal benefits to individual Aerie members.

19. The Grand Aerie sells goods and extends privileges to Local Aeries and to individual members of Local Aeries in exchange for annual membership fees.

20. The Grand Aerie, the State Aerie and the Local Aeries conduct social, charitable, community, service, vocational, fundraising and other activities. Some of the activities take place in public places. Although some of

the activities take place in facilities that are owned by the Local Aeries, male and female members of the general public are freely admitted as guests to those activities, with the exception of the bi-monthly membership meetings that are typically less than 2 hours long. Prior to the admission of women as members of Local 564, women participated in all activities of the Local Aerie except the bi-monthly membership meetings.

21. The Constitution of the Grand Aerie, and therefore of all Local Aeries, declares that the Grand Aerie may not "pass any law in conflict with this constitution, nor any law in conflict with the laws of the United States or the Dominion of Canada or of any state, territory or province in which a local aerie is located, or pass any law which will interfere with the religious or political convictions of members of the Order." Plaintiffs allege that the exclusion of women is, in fact, contrary to law and violates their constitutional rights of free association and equal protection.

20. [sic] On June 23, 1999, and again on June 25, 1999, leaders of the State Aerie, claiming to be the agents of the Grand Aerie, attempted to take the Charter of Aerie 564. Although they did not have proper authorization, did not follow the procedure set forth in the Eagles' Constitution, and did not succeed in taking the Charter, upon information and belief that plan to return again to make another attempt to do so in the next few days.

21. [sic] Tenino Aerie 564 and Whidbey Aerie 3418 depend on their good standing as a chartered organization within the Grand Aerie. Any adverse action by the Grand Aerie or the State Aerie will result in irreparable harm, not compensable by money, to the Aeries, their members,

including the individual plaintiffs, and prospective male and female members.

22. [sic] Tenino Aerie 564 continues to admit women.

23. [sic] Whidbey Island Aerie 3418 has admitted women from 1996 until March of 1999. As a direct and proximate result of defendants' actions, plaintiffs have and will suffer damages in an amount greater than $35,000.

IV. CAUSES OF ACTION

22. *First Cause of Action*. Defendants' arbitrary and discriminatory membership policy of excluding women violates Washington's Law Against Discrimination, Chapter 49.60 RCW.

23. *Second Cause of Action*. Defendants' arbitrary and discriminatory membership policy of excluding women violates plaintiffs' rights under Article XXXI, Section 1 of the Washington Constitution, the Equal Rights Amendment.

24. *Third Cause of Action*: Defendants' arbitrary and discriminatory membership policy of excluding women impermissibly violates plaintiffs' rights of free assemblage and association under Article I, Section 4 of the Washington State Constitution.

25. *Fourth Cause of Action*. Defendants' arbitrary and discriminatory membership policy of excluding women constitutes an unfair business practice in violation of the Washington Consumer Protection Act, Chapter 19.86 RCW.

Fifth Cause of Action. Defendants' arbitrary and discriminatory membership policy of excluding women

constitutes a breach of the contract and charter between the Grand Aerie and Local 564.

27. *Sixth Cause of Action*. Defendants' arbitrary and discriminatory membership policy of excluding women constitutes interference with plaintiffs' business relationships.

V. PRAYER FOR RELIEF

WHEREFORE, plaintiffs request:

1. *Declaratory Relief*. A declaration that: (a) defendants' policy of excluding women from membership is illegal; (b) defendants breached their contract and charter with Aerie 564 and Aerie 3418; (c) female plaintiffs and other female members are bona fide members of the Aerie 564 and the Grand Aerie with the same rights and privileges as any other member; and (d) Aerie 564 and Aerie 3418 are and will continue to be a Local Aeries in good standing under charter from the Grand Aerie, notwithstanding its admission of women to membership.

2. *Injunctive Relief*. Preliminary and permanent injunctions restraining, enjoining and prohibiting defendants, their successors, officers, agents or employees from: (a) suspending or revoking the charters of Aerie 564 or Aerie 3418, or taking any action that could lead to the suspension or revocation of those charters; (b) from failing to process any names submitting by Aerie 564 and Aerie 3418 as members, provided that the Aeries conclude that the members satisfy all of the provisions of Section 70.2 of the Eagles' Constitution, except the provision that requires the member to be male; (c) suspending or revoking the membership of any member of Aerie No. 564 or Aerie

No. 3418, or for bringing any members of Aerie 564 or Aerie 3418 up on fraternal charges; (d) taking any action inconsistent with the treatment of female members of Aerie 564 or Aerie 3418 as full, active members of the Grand Aerie; and (e) maintaining or reinstituting its threat of revoking the charters of Local Aeries that choose to admit women.

3. Damages in such amount as may be proven at trial, plus treble damages as provided by Chapter 19.86 RCW;

4. An award of plaintiffs' costs, expenses and reasonable attorneys' fees; and

5. Such additional relief as the Court may deem just.

DATED this *20th* day of July, 1999.

CAIRNCROSS & HEMPELMANN, P.S.
/s/ Rosemary Daszkiewicz
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Supreme Court No. 71786-9

Court of Appeals No. 25864-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

FRATERNAL ORDER OF EAGLES,
TENINO AERIE NO. 564, et al.,

Petitioners,

v.

GRAND AERIE OF THE FRATERNAL ORDER OF EAGLES; and FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE,

Respondents.

SUPPLEMENTAL BRIEF OF GRAND AERIE

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* * *

INTRODUCTION

The legal issues presented by this case were fully briefed before the Court of Appeals and in the briefs filed in connection with the Petition for Review. The Grand Aerie files this supplemental brief to inform the court of recent decisions. Recent decisions reaffirm the First Amendment right of the Fraternal Order of Eagles to make membership decision without governmental interference.

Recent decisions have also made clear that the membership practices of fraternal organizations like the Eagles are exempt from statutes like the Washington Law Against Discrimination.

LEGAL ARGUMENT

I. The First Amendment Protects the Fraternal Order of Eagles From Governmental Interference With Its Membership Decisions.

The United States Supreme Court's decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), holds that the First Amendment protects private social groups who engage in "expressive association" from governmental interference that significantly affects that expressive association. As set forth in detail in the trial court record and in the Grand Aerie's Court of Appeals briefing, the Grand Aerie engages in expressive association in the form of ritual practices that emphasize the value of brotherhood and friendship among a group of men and also the value of sisterhood and friendship among a group of women.[1] Forced inclusion of women in aerie rituals would render the ritual expressive practices meaningless because the rituals could no longer express the values of brotherhood among men and sisterhood among women.[2]

---

[1] *See* Wahls Declaration. CP 598-99. *See also*, 1998 Proceedings of the Grand Aerie at 97-98 CP 484-85. In addition to monthly male-only rituals, the Eagles conduct monthly female-only rituals that express the value of sisterhood and friendship among a group of women.

[2] *See* Wahls Declaration. CP 598-99. Similarly, forced inclusion of men in female-only rituals would render those ritual expressive practices meaningless.

Recent decisions confirm that the First Amendment precludes application of the anti-discrimination to the membership decisions of private social groups. In *Donaldson v. Farakhan,* 436 Mass. 94, 762 N.E.2d 835 (Mass. 2002), the Massachusetts Supreme Court concluded that a female plaintiff had presented insufficient evidence that a public theater speech by Louis Farakhan was a "public accommodation." The court held that application of public accommodation laws to a private male-only meetings would violate the first amendment rights of the participants. The court explained:

> To be afforded First Amendment protection, there is no requirement that an association exist for the particular purpose of disseminating a specific message. *Boy Scouts of Am. v. Dale, supra* at 655, 120 S.Ct. 2446. It must merely engage in expressive activity that would be impaired by the unwanted inclusion. *Id.* Here the mosque's men's class was engaging in its religious meeting for men only, expressing concern for the community, and discussing the moral ideology and roles of men in addressing crime and violence in the community. The expression of religious viewpoints specific to men of the faith would have been impaired by the inclusion of women in the meeting.

Id. at 841.

In reaching its conclusion, the court applied the *Dale* decision, and accepted the all-male group's representation that separation of the sexes at meetings is part of their belief system. The court explained:

> The sincerity of these religious beliefs and practices is not for us to question. *See Boy Scouts of*

> *Am. v. Dale,* 530 U.S. 640, 651 (2000), citing *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981), and *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 714 (1981). Rather, we must decide whether the forced inclusion of women in the mosque's religious men's meeting by application of the public accommodation statute would significantly burden the mosque's expressive association. . . .
>
> If the forced inclusion of an unwanted person affects in a significant way the group's ability to advocate public or private viewpoints, it is in violation of the First Amendment. Dale, citing *New York State Club Ass'n, Inc. v. City of N.Y.,* 487 U.S. 1, 13 (1988).

Id. at 840. In the case before this court, forced inclusion of women in aerie meetings (and men in women's auxiliary meetings) would significantly affect members' ability to express their sincere belief in the value of brotherhood among a group of male friends and sisterhood among a group of female friends. Accordingly, the relief sought by petitioners would violate the First Amendment. *See also, Boy Scouts of America, South Florida Counsel v. Till,* 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (holding that School Board's Action excluding Boy Scouts from facilities because of Board's disagreement with membership criteria would violate First Amendment); *Roman v. Concharty Council of Girl Scouts, Inc.,* 2002 WL 745777 (M.D. Ga. 2002) (holding that Girl Scouts is a bona fide private membership club entitled to First Amendment-based exemption from Title VII and the ADA).

II. Washington's Anti-Discrimination Statute Exempts Fraternal Organizations.

As explained in detail in the Grand Aerie's prior briefs filed in the Court of Appeals and in this court, the Washington Law against Discrimination ("WLAD") exempts fraternal organizations from its public accommodations provisions. If this Court applies the statutory exemption according to its plain meaning, the WLAD does not apply to the Eagles' membership decisions, and the Court does not need to reach the First Amendment issue.

Recent decisions of courts of other states addressing this issue have held fraternal groups to be expressly exempt from anti-discrimination statutes. For example, in *Gifford v. Guilderland Lodge, No. 2480, B.P.O.E. Inc.*, 707 N.Y.S.2d 722 (N.Y.A.D. 3rd Dept. 2000), the New York Appellate Division decided a case like the present case. Like the Washington statute, New York's public accommodations law exempts accommodations that are "distinctly private." The statute also provides that "a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private" *Id.* at 722.

As in the present case, the plaintiff argued that "the exempt status of the Guilderland Elks Lodge is subject to the qualifying conditions set forth earlier in the statute with respect to membership size, meal service and the provision of space, facilities and services to nonmembers." The court held:

> We find the argument unpersuasive. A plain reading of the statute reveals that the exemption for organizations formed pursuant to the Benevolent Orders Law is absolute and not subject to limitation. This interpretation accords with the legislative intent behind the amendment deeming religious corporations and benevolent orders to be "distinctly private."

707 N.Y.S.2d at 722-23.

Unlike the Washington and New York statutes, Oregon's public accommodations statute contains no express exemption for fraternal organizations. Even without an express exemption, the Oregon Court of Appeals held that there is an issue of fact about whether the Fraternal Order of Eagles is a public accommodation subject to the Oregon statute. *Lahmann v. Grand Aerie of Fraternal Order of Eagles,* 180 Or. App. 420, 43 P.3d 1130 (2002). The *Lahmann* court deferred a decision about whether application of the Oregon statute to the Eagles would violate the First Amendment, reasoning that it would be premature to reach that issue until the "historical facts about whether the [Oregon] Public Accommodations Act applies to the Eagles are resolved at trial." *Id.* at 1138. In the present case, no trial is necessary because, unlike the Oregon statute, Washington's statute expressly exempts fraternal organizations, and there is no dispute that the Fraternal Order of Eagles is a fraternal organization. Washington's express exemption avoids the First Amendment infringement that would result from application of the WLAD to membership decisions of fraternal organizations.

CONCLUSION

For these reasons and the reasons set forth in the Grand Aerie's Response to the Petition for Review and Court of Appeals briefing, the decision of the Court of Appeals should be affirmed.

DATED this 15th day of May, 2002.

By /s/ John W. Widell
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(2)

Supreme Court, U.S.
FILED
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No. 02-1415

In The Supreme Court of the United States

GRAND AERIE, FRATERNAL ORDER OF EAGLES,

Petitioner,

v.

TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES; KATHLEEN J. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENRITER; ALICE F. VASSAR; and WHIDBEY ISLAND AERIE NO. 3418, FRATERNAL ORDER OF EAGLES,

Respondents.

On Petition For Writ Of Certiorari To The Washington Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

May Washington State apply its anti-discrimination statute to prohibit a non-private, non-selective club from excluding women from membership solely based on gender, especially where the organization previously extended membership to women who remain members of the organization?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is the Grand Aerie, Fraternal Order of Eagles ("Grand Aerie"), the governing body of the Fraternal Order of Eagles ("Eagles"). The Eagles is a non-profit national organization with approximately 700,000 members worldwide that engages in a range of civic activities. CP 597. The Eagles has chapters, or "local aeries," operating in many states, including the State of Washington. Historically a male-only organization, the Grand Aerie, on its own initiative and of its own volition, extended membership to women between 1995 and 1998.

The organizational Respondents in this Court are the Fraternal Order of Eagles, Tenino Aerie No. 564 (the "Tenino Aerie"), and the Fraternal Order of Eagles, Whidbey Island Aerie No. 3418 (the "Whidbey Island Aerie"), two local aeries in Washington that admitted women as full members under the direction and consent of the Grand Aerie during the 1995-1998 period. Petitioner incorrectly asserts that all individual respondents are "women who were denied membership." Petition at ii. Respondents Julia A. Foster, Alice F. Vassar, Janet Tresenriter, Annette M. Riley, and Gayle L. Hartmann were admitted by Respondent Tenino Aerie, paid their membership dues, and were officially admitted as full members to the Eagles by the Grand Aerie. The Grand Aerie refused to issue membership numbers and returned membership dues to only four Respondents, Kathleen L. Connor, Lanette Davis, Kaycee L. Johnson, and Dianne E. Roberts, who had been admitted by the Tenino Aerie.

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Sup. Ct. R. 10 8

I. OPINION BELOW

The decision of the Washington Supreme Court is reported as *Fraternal Order of Eagles, Tenino Aerie No. 564, et al. v. Grand Aerie of Fraternal Order of Eagles, et al.*, 148 Wash. 2d 224, 59 P.3d 655 (2002).

II. CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment

Washington State Constitution, Equal Rights Amendment

Washington Law Against Discrimination, Wash. Rev. Code 49.60.010 *et seq.*

III. COUNTERSTATEMENT OF THE CASE

A. Facts Giving Rise to the Dispute.

Petitioner urges that the exclusion of women is an aspect of its right of expressive association. Yet, on November 27, 1995, the Grand Aerie, in response to a changed social and legal climate, voluntarily directed local aeries that they could begin admitting women as Eagles members without restriction on their participation within the organization.[1] Clerk's Papers ("CP") 820. Between 1995

[1] In 1995, the Grand Aerie determined that the provision in the Eagles' statutes requiring members to be male was contrary to law, and issued an opinion stating that the statutory limitation to males was unenforceable. Opinion No. 750, CP 813. Even before 1995, some women were eligible for membership through an internal organization

(Continued on following page)

and 1998, following the Grand Aerie's direction, local aeries such as Respondents Tenino Aerie and Whidbey Island Aerie began admitting women. App. 11, CP 639 (Decl. of Charles N. Tarver, ¶16). The resulting increased membership poured money into the Eagles' coffers and, in the case of groups such as the Tenino Aerie, stabilized the local aeries' finances. *Id.* ¶17. Effective July 30, 1998, the Grand Aerie revoked its gender-neutral policy, but allowed all then-admitted female members to remain in the local aeries and the national organization. CP 825. There are no degrees of membership in the Eagles. CP 881. Thus, these women continue to fully participate in all Eagles activities, including the ritual activities upon which Petitioner relies to demonstrate its associational claim. Petition at 14. Respondents, two local aeries, current female Eagles members, and female applicants who were denied membership after the change, challenged the Grand Aerie's reimposition of a gender-based membership policy.

B. The Eagles' Charter Documents and Practices do not Reveal an Articulated Expression in Favor of the Exclusion of Women.

The Grand Aerie's decision to permit the admission of women in 1995 appears to have been based on its recognition of the reality of the legal landscape nationwide

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known as REAC, the Retired Eagles Activity Club: "An Aerie member's wife, who with him belongs to REAC does not surrender or lose her REAC membership if he dies and she is not a member of the Ladies Auxiliary." CP 962-63.

following this Court's rulings in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and subsequent state and lower federal court cases. CP 813 (Opinion 750). The decision was consistent with the Eagles' foundational documents and virtually all other published expressions of the purpose and objectives of the organization. For example, the Eagles' Articles of Incorporation,[2] last amended in 1948, state that the purpose of the Eagles is to "unite fraternally for the mutual benefit, protection, improvement and social enjoyment of *all persons*." CP 877 (emphasis added). The preamble to the Eagles' Constitution states that the purpose is to "unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality." CP 879.

The Eagles' Articles of Incorporation and Constitution are devoid of any suggestion that women are somehow antithetical to the organization's mission, procedures, or message. CP 875-86. Also missing from the Eagles' organic documents are any references to "manly virtue," a phrase that appears in the record in only one line in one declaration. *See* CP 598 (Decl. of Robert Wahls, at ¶11). The organization's gender-inclusive message is repeated in other publications, such as the new member brochure,

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[2] The Eagles' foundational documents include Articles of Incorporation and a Constitution. CP 875-86. Following a pattern common in federal and state law, the Eagles have also adopted statutes, which provide more detailed operational instructions. CP 887-97. The male-only membership requirement appears at Statute 70.2.

which describes the Eagles as "more than anything else, [ ] a dream – the dream that ordinary men *and women* everywhere are entitled to and shall enjoy the right to life, to liberty, and to the pursuit of happiness with some reasonable chance of catching up to it in their lifetime." Lodging ("L") at 14, CP 705 (emphasis added).

The Eagles has consistently included women in most aspects of the organization. Before 1995, women were able to participate in almost all Eagles activities through a Ladies' Auxiliary, which was designed "to aid the Grand Aerie and be helpful to it in carrying out the Grand Aerie's charitable, humanitarian, patriotic and other activities[.]" CP 904. Auxiliary members, however, have never been admitted to full Eagles membership. From 1995 forward, as promised by the Eagles' Constitution, female members have participated as full voting members of the Eagles, entitled to perform the organization's rituals in their own local aeries, and to attend the performance of the rituals at any other local aerie. CP 885, CP 151 at ¶4.

C. The Eagles Engage in Widespread Public Recruiting Activities and are Largely Unselective in Membership.

The Eagles place a heavy emphasis on continuous membership recruitment. Membership drives are an essential feature of the Eagles and new membership is vital to the financial well-being of the organization. The Eagles has a membership department charged with maintaining and increasing membership. CP 896. The membership department distributes a new member brochure that, in addition to emphasizing the organization's civic orientation, states in large block letters: "Every Member Owes at Least One New Member to His Aerie

Each Year." L 14, CP 705. One Eagles brochure emphasizes the need for Eagles members to "Sell Eagledom." L 9, CP 865. In Washington State, as elsewhere, the Eagles rely on membership quotas and programs to increase membership. CP 798. Indeed, there are cash awards for bringing in new members. L 1, CP 803. There is little selectivity in Eagles membership determinations. For example, during the period from 1994 to 1999, the Tenino Aerie added 450 members. App. 11, CP 638 (Decl. of Charles N. Tarver, ¶13). Of those who applied during that time, only two were rejected. *Id.* The application for membership is indicative of what is required to become a member, requesting only the applicant's name, address, phone, date of birth, and whether the applicant was previously an Eagles member. L 16, CP 775. Notably, the application does not reference gender. *Id.*

In the Eagles, membership determinations are largely a matter of local aerie decision. The Eagles' Constitution provides that "[e]ach Local Aerie shall be the sole judge of the persons who may be admitted as guests or members." CP 885. As noted, the Eagles' charter documents do not limit membership to men. While the Eagles' Constitution does require members to believe in a Supreme Being, CP 928, such a belief bears no nexus with gender. The male-only membership criterion appears, not in the Eagles' charter and constitution, but in the organization's statutes. CP 928.

D. Eagles' Activities are Civic, Financial and Charitable in Nature, With Corresponding Financial Benefits to Members.

Large membership numbers are the driving force behind the Eagles' decades-long commitment to public

civic activities. The Eagles' Statutes create a program department that has the duty of carrying on "*civic*, patriotic, fraternal and social programs." CP 896 (emphasis added). Due in large part to its high membership numbers, the Eagles control substantial sums and make large charitable donations. For example, during the 1980s, the Eagles raised $23 million for charities. L 13, CP 868. The Eagles was so instrumental in the passage of the Social Security Act that President Franklin D. Roosevelt presented the pen with which he signed the Act to the Eagles as "a symbol of my approval of the Fraternity's vision and courage." L 14, CP 705. The Eagles distinguishes itself from other fraternal organizations because Eagles "reach outside their own ranks to fight for the welfare of all." L 14, CP 705.

Eagles membership carries important social and financial benefits. Six presidents of the United States have been Eagles members. L 13, CP 869. One of the four corporate purposes of the Eagles is "[t]o establish and maintain an insurance department" – for death, old age disability and other benefits. CP 877 (Articles of Incorporation). Members of some local aeries may purchase this insurance. CP 858. Members' families may also be the financial beneficiaries of the Eagles Memorial Foundation. CP 910. For example, in the 1940s, $3 million was raised to honor those Eagles who were among the war dead, and to provide medical, dental, and educational aid for children of Eagles servicemen who died. L 10, CP 866. In the 1960s, the Foundation also began to provide aid for the educational and health needs of children of Eagles members who were police officers or firefighters killed on duty.

Local aeries are also social centers for their members and the larger community. For example, the Tenino Aerie's

facilities include a bar, a dance floor, and space for meetings and activities. The Tenino Aerie has sponsored community parades, pancake breakfasts, holiday events for children and families, karaoke nights, beer gardens and weekly suppers, with many of these functions being attended by members of the community. App. 4, CP 771 (Decl. of Alton F. Brasher, ¶3).

Although Petitioner introduces in its Petition for Certiorari a description of the organization as a "quasi-religious group," the Eagles' Constitution specifically states that the Grand Aerie cannot adopt laws that interfere with the religion of its members. CP 885-86. The record is bereft of evidence that the Eagles is a "quasi-religious" group. Regardless of the level of religious activity by individual Eagles, there is no suggestion that the women who sought Eagles membership did not share a belief in a Supreme Being.

E. Proceedings Before the State Courts.

When the Grand Aerie reversed its direction on the admittance of women, the Tenino and Whidbey Island Aeries brought suit, claiming that the reinstated male-only membership policy violated the Washington Law Against Discrimination ("WLAD"), which prohibits discrimination in areas of public accommodation. The trial court granted summary judgment in favor of the local aeries, finding that fraternal organizations are exempt from the WLAD only if they can prove they are "distinctly private," and that the Eagles is not. *Eagles*, 148 Wash. 2d at 232-33. The Washington appellate court reversed, finding that fraternal organizations are exempt under the WLAD regardless of whether they are private. *Fraternal*

Order of Eagles, Tenino Aerie No. 564, et al. v. Grand Aerie, Fraternal Order of Eagles, et al., 108 Wash. App. 208, 217, 27 P.3d 1254 (2001). The Washington Supreme Court disagreed, concluding that such an interpretation would frustrate the purposes of the WLAD and holding that, because the Eagles is not private, the Grand Aerie cannot discriminate against women in the state of Washington. *Eagles*, 148 Wash. 2d at 256-57.

V. REASONS FOR DENYING THE WRIT

A. Summary of Reasons to Deny the Writ.

The Petition fails to establish an appropriate ground for granting the requested writ. Petitioner cannot demonstrate that the Washington Supreme Court's decision in this case, which focused on the interpretation of a grammatically ambiguous state statute, decided an important federal question in a way that conflicts with relevant decisions of this Court or other cases. *See* Sup. Ct. R. 10.

On the contrary, the Washington Supreme Court followed this Court's direction in *Roberts v. United States Jaycees* and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte* to consider certain factors, such as aggressive membership recruiting, organization size, and selectivity of membership decisions, in its determination that the Eagles was not private and therefore subject to Washington's anti-discrimination laws. The decision accords with relevant precedent and is not in conflict with *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which concerned the application of state anti-discrimination law to a concededly private organization.

Specifically, the Washington Court's ruling does not conflict with *Dale* because the Eagles has no expressive interest in excluding women. Indeed, by its own action, the Eagles has extended membership rights to women who continue to be active in the organization. Further, whatever minimal burden, if any, that compliance with anti-discrimination law imposes on the Eagles' associational rights is justified by Washington's compelling interest in preventing gender discrimination. Likewise, Petitioner's other cited authorities do not conflict with the Washington Supreme Court's ruling, as they either were based on entirely different statutes or involved an exclusively private religious group.

B. The Washington Supreme Court's Decision Accords With Precedent.

This Court's prior cases guide analysis of the impact of state anti-discrimination laws on an organization's freedom to exclude members on the basis of gender, race, sexual orientation, or other suspect classification. The expressive interests of private organizations have greater protection from government regulation than those of non-private organizations. *See, e.g., Louisiana Deb. and Lit. Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995). To determine whether an organization is private, courts apply the factors enunciated in *Roberts v. United States Jaycees* and affirmed in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*. 468 U.S. 609 (1984); 481 U.S. 537 (1987). The constitutional analysis then requires a court to determine 1) whether the organization is an expressive association; 2) whether compliance with the law materially interferes with the ideas the organization seeks to express; and 3) if so, whether there is a compelling

governmental interest that justifies the intrusion. *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2000) (discussing *Roberts* and *Rotary*).

In this case, the Washington Supreme Court correctly applied the *Roberts* factors and determined that the Eagles is not a private organization. Thus, the Eagles is properly subject to state anti-discrimination law and Washington's compelling interest in preventing discrimination outweighs vague and unsupported allegations of harm to the Eagles' expressive freedom. While the Washington Supreme Court did not expressly analyze *Dale*, its opinion is consistent with the holding of that case, and the writ should be denied.

1. The Washington Supreme Court Correctly Applied *Board of Directors of Rotary Int'l v. Rotary Club of Duarte* and *Roberts v. United States Jaycees* to Determine that the Eagles are not Private.

The Washington Supreme Court properly applied state law in accordance with the standard established by this Court in *Roberts v. United States Jaycees*. 468 U.S. 609. In *Roberts*, the Jaycees' discriminatory admission polices were properly struck down under the Minnesota Human Rights Act, which forbids gender discrimination in public accommodations. *Id.* *Roberts* announced a list of factors that distinguish private organizations, whose expressive associational rights are protected by the Constitution, from public accommodations that merit lesser First Amendment protection: size, purpose, policies, selectivity, congeniality and other characteristics pertinent to the particular case. *Id.* at 620. In *Roberts* itself, the

Court found that two local chapters of the Jaycees were "large and basically unselective groups." *Id.* at 621. Thus, the local chapters were not private, a finding supported by the fact that the chapters were not small or selective, did not employ criteria for judging applicants for membership, routinely recruited and rarely denied members, allowed women to attend meetings and participate in organizational functions, and allowed non-members of both genders to participate in activities, programs and recruitment meetings. *Id.*

The *Roberts* analysis was affirmed in *Board of Directors of Rotary Int'l v. Rotary Club*. 481 U.S. at 546. Like *Roberts*, *Rotary* upheld a challenge to a gender-based admissions policies under a state anti-discrimination statute. Key to the Court's reasoning that discriminatory membership standards could not be sustained was the Rotary Club's policy directing local chapters to recruit a steady stream of prospects to offset attrition and to increase membership. In *Rotary*, the Court recognized that the purpose of such recruiting drives is to produce an inclusive, not exclusive, membership. *Id.*

Applying the *Roberts* factors, the Washington Supreme Court found that the Eagles is not private. The Eagles' aggressive membership recruiting drives result from the identical membership concerns discussed in *Rotary*. As the Washington Supreme Court noted, the Grand Aerie's new member brochure evidences a lack of exclusivity. *Eagles*, 148 Wash. 2d at 254. The brochure proclaims the Eagles' slogan: "Every Member Owes at Least One New Member to His Aerie Each Year." L 14, CP 705. The Eagles reward local aeries and individual members for producing new members. L 1, CP 803. The drive to increase membership is demonstrated by the membership

quotas, cash rewards for recruiting, and the extraordinarily high rates of admission. L1, CP 803, CP 638. For example, one local aerie added 450 new members over a four-year period, rejecting only two applicants during that time. App. 11, CP 638. The Washington Supreme Court correctly found that the Eagles is not distinctly private and therefore is not entitled to an exemption from Washington's laws against discrimination. *Eagles*, 148 Wash. 2d at 256-57.

Petitioner's argument that *Roberts* and *Rotary* apply exclusively to public accommodations that promote business interests lacks merit. *Roberts* and *Rotary* hold only that the presence of a business interest is one of a number of factors that can be considered in determining whether a *Roberts* and *Rotary* analysis should be applied. Even if *Rotary* and *Roberts* were to apply only to groups that promote members' business interests, however, the Eagles satisfies any such requirement. Petitioner's claim that the Eagles is not a civic or business group, Petition at 6, is belied by the Grand Aerie's own materials. *See, e.g.,* CP 706. Further, the Grand Aerie admits that its policy banning discussion of business applies only when members are actually engaging in ritual activities. *Eagles*, 148 Wash. 2d at 250.

2. The Washington Supreme Court's Ruling does not Conflict With *Boy Scouts of America v. Dale* Because the Eagles are not Private.

The Washington Supreme Court's ruling is not contrary to *Boy Scouts of America v. Dale* because this case, like *Roberts* and *Rotary*, concerns the application of a state anti-discrimination statute to a *non-private* group. *Cf.*

Dale, 530 U.S. at 644. The *Dale* decision, conversely, dealt exclusively with the application of such state laws to a concededly private organization. *Id.* at 644 ("The Boy Scouts is a private, not-for-profit organization . . ."). *Dale* did not overturn *Roberts* and *Rotary*. Respondents do not dispute that an organization's right to expressive freedom is accorded greater deference when that organization is private. *See, e.g., Louisiana Deb. and Lit. Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995). The Eagles is not, however, a private organization. Further, regardless of whether an organization is public or private, *Dale* reaffirmed the *Roberts* proposition that an organization's freedom of expressive association is not absolute and can be overridden by compelling state interests. *Id.* at 648.

3. The Washington Supreme Court's Ruling was Correct Because the Continued Admission of Women Causes no Harm to the Eagles' Expressive Freedom.

Even if the Eagles were a distinctly private organization, Petitioner's reliance on *Dale* would be misplaced. *Dale* concerned a fundamentally different situation in which the forced inclusion of an openly homosexual gay rights advocate would run counter to the private organization's consistently articulated voice against specific conduct and the values it tries to inculcate in young members. *Dale* found that forcing the Boy Scouts to keep an openly homosexual member undermined the organization's articulated expressive stance against homosexual conduct. *Id.* at 652, *see also id.* at 659 ("A state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to

oppose or disfavor homosexual conduct."). Consequently, *Dale* concluded that the mandated inclusion of homosexuals in the Boy Scouts "would significantly affect its expression." *Dale*, 530 U.S. at 656. The *Dale* concern with governmental repression of an organization's expressive voice is not raised by this case, which involves an organization that 1) already has members from the group that it now wishes to exclude and 2) has no expressive stance implicated by inclusion of that group.

Dale sought to prevent the repression of a private group's consistently expressed values. *See id.* at 651. To that end, the Court noted that the Boy Scouts had a long and consistent history of expressing a belief in the incompatibility of homosexuality with scouting. *Id.* at 651-57. In addition to writings that have reiterated that message repeatedly over the years, the Scouts had previously expelled homosexual members. *Id.* at 652 (referencing prior litigation on similar facts). Unlike the Scouts, the Eagles does not have an articulated expressive voice against women generally, nor is its current stance against women members consistent with its prior admission and current retention of women members.

In further contrast with the Boy Scouts, the Grand Aerie does not claim that women engage in conduct antithetical to the Eagles' message. Instead, the Grand Aerie's discriminatory membership policy is based on gender status – a physical fact unrelated to the Eagles' mission or message. *See Dale*, 530 U.S. at 653-54 (in allowing organizers of a private St. Patrick's Day parade to exclude a group of gay rights advocates that wanted to march with a banner, the Court noted that the upheld exclusion was not based on the individual advocates' status, but rather that the group's intended message to

parade watchers was not one parade organizers wished to communicate) (discussing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)). Unlike *Dale* or *Hurley*, the inclusion of women as Eagles members does not implicitly force the Eagles to express an idea that is contrary to their core values. *Cf. Dale*, 530 U.S. at 654 ("As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.").

The Eagles' literature makes clear that the purpose of the organization is gender-neutral: to inculcate the principles of liberty, truth, justice and equality. CP 644. The Eagles' Constitution is also remarkably gender neutral. Allowing women is harmonious, not incongruent, with the Eagles' message of inculcating liberty, truth, justice and equality – as demonstrated by the fact that the Eagles have had women as members for the last eight years with no apparent negative consequences to their expressive voice or mission.[3] As *Roberts* unequivocally explained:

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[3] While Petitioner repeatedly claims that having female members is fundamentally incompatible with the Eagles' "ritual practices that emphasize the value of brotherhood and friendship among a group of men and also the value of sisterhood and friendship among a group of women," Petition at 18, this assertion remains entirely unexplained, even after eight years of female participation in these rituals. Just as a male Eagles member may apparently affirm his support of the value of "sisterhood among women" without conflict, *id.*, there is nothing about

(Continued on following page)

> There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these [civic, charitable and other] protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interest of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.

Roberts, 468 U.S. at 627. Admitting women to the Eagles does not impede the organization's expressive rights or alter its ideological or philosophical message, as demonstrated by the Eagles' retention of those female members that it already has.

Even if the Eagles once had a consistent associational expression in favor of excluding women, a proposition not supported by the record in this case, the organization's practices no longer support such a position. The Grand Aerie's decision to allow women to remain in the Eagles is uncontrovertable evidence that the Grand Aerie's expressive freedom and message are not harmed in the manner that the Boy Scouts' message was allegedly adversely affected. As discussed, the Grand Aerie admitted women for several years, and, even after its reversal in policy, *retained* the admitted women members. This voluntary decision to allow women to remain members and to perform the Eagles' rituals is inconsistent with the Grand

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her gender *per se* that prevents a woman from affirming support for "the values of brotherhood among men." *Id.*

Aerie's current position that allowing women to perform the rituals somehow impacts its expressive voice. Even after eight years of women performing the rituals, the Grand Aerie points to no evidence that the admission of additional female members affects the expression of those rituals or otherwise dilutes the Eagles' message. Indeed, the only evidence that the Grand Aerie points to that is *consistent* with its position in this litigation are the comments some members made during the discussion surrounding the 1998 decision to stop admitting female members. Petition at 16-17. These isolated comments do not represent the collective voice of the Eagles. Rather, its charter documents, its history of involving women in almost every aspect of its affairs, and its decision to allow admitted women to remain members constitute that collective voice. For all these reasons, the Grand Aerie's current assertions regarding the nature of its expression are not entitled to the same deference that was accorded to the Boy Scouts. *See Dale* at 657-58.

4. The Washington Supreme Court's Ruling was Correct Because any Incidental Burden on the Eagles' Expressive Interests is Justified by Washington's Compelling Interest in Preventing Discrimination.

The Washington Supreme Court's decision comports with that state's strong interest in preventing gender discrimination and reflects clearly established state policy against gender-based exclusions. As *Rotary* recognized, any slight infringement on the right of expressive association of a group's members can be justified by a state's compelling interest in eliminating discrimination against

women. *Rotary*, 481 U.S. at 549. Petitioner's characterization of Washington's interest in preventing gender discrimination as "tentative" is absurd. *See* Petition at 19. Unlike the United States Constitution, Washington's Constitution has an Equal Rights Amendment that specifically bans gender discrimination. Wash. Const., Art. XXXI, §1. The Equal Rights Amendment "absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.'" *Beeston v. Guard*, 83 Wash. App. 325, 331, 921 P.2d 544 (1996) *aff'd*, 132 Wash. 2d 660, 940 P.2d 642 (1997).

The Washington Supreme Court correctly found that unconditionally exempting groups who merely self-identify as "fraternal organizations" from state anti-discrimination law, without requiring a demonstration that the group is actually private, undermines the purpose of a statute that is designed to prevent discrimination in all public settings. *Eagles*, 148 Wash. 2d at 256. Washington has an especially strong interest in preventing gender discrimination, and any alleged infringement on the Grand Aerie's expressive interest in banning further female members while retaining those already admitted is justified by Washington's compelling interest in eliminating gender discrimination.

5. The Washington Decision is Consistent with Other Cases Cited by Petitioner.

None of the cases Petitioner cites to establish a conflict between the Washington Supreme Court's decision and other decisions are persuasive. For example, *Donaldson v. Farrakhan*, 436 Mass. 94, 762 N.E.2d 835 (Mass. 2002), involved a truly religious organization that

had defined and religiously-based gender roles. In *Donaldson*, the female plaintiff was denied entrance to a religious men's meeting of Muhammad's Mosque No. 11, an affiliate of the religion of the Nation of Islam, at which the Rev. Louis Farrakhan was to speak. *Id.* The Massachusetts Court recognized that the Nation of Islam's separation of the sexes through weekly separate meetings "is part of the belief system and has been a part of the Nation of Islam's religious practices for more than sixty years." *Id.* at 101. The *Donaldson* Court recognized that Farrakhan's speech at the meeting in question was directed at the men of the mosque, particularly those males engaging in crime and violence, and including women would change the message. *Id.* at 101-102.

The *Donaldson* facts cannot be equated with the position of the Grand Aerie, which for three years recruited and continues to retain female members for an organization whose only religious criterion is a "belief in a Supreme Being." Moreover, the Eagles expressly attempts to avoid specific religious positions, including a constitutional requirement that prevents the Eagles from taking positions that are inconsistent with the various religious beliefs of its members. CP 885-86. Notwithstanding the Grand Aerie's description of the Eagles as a "quasi-religious" organization, Petition at ii, the record establishes that the Eagles are a civic and charitable organization, not a religious one.

Petitioner's reliance upon *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988), for the proposition that a categorical exemption from discrimination laws exists for those clubs that do not engage primarily in business activities is misplaced. In *New York*, city law explicitly and categorically exempted

all benevolent orders because such organizations "have not been identified in testimony before the Council as places where business activity is prevalent, [and therefore] the Council has determined not to apply the requirements of this local law to such organizations." *Id.* at 7 (quoting New York Local Law No. 63, sec. 1). Thus, whether the individual clubs in question were private was not at issue in the case – they were specifically deemed private under the law at issue. *Id.* at 6-7. Further, the Court recognized that the city law could be constitutionally applied to a non-private organization. *Id. New York* is not inconsistent with the Washington Supreme Court's decision.

C. Application of the Washington Law Against Discrimination to the Eagles does not Raise an Important Federal Issue.

The Washington Supreme Court's decision raises no important federal issue. Rather, it resolves a grammatical ambiguity in a state statute – specifically, the question of "whether the [Washington] Court of Appeals erred in its reading of the Washington Law Against Discrimination to automatically exclude fraternal organizations from application of the prohibitions in RCW 49.60.040(10) and that fraternal organizations are included in the exemption for 'any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations.'" *Eagles*, 148 Wash. 2d at 236. The Washington Supreme Court's decision contains extensive discussion of rules of punctuation and grammar, such as adjective and relative clauses. *See id.* at 239-43. This particular grammatical issue – and the Washington Supreme Court's resolution of the question – is not in conflict with federal law or the law of any other state.

Although the Eagles operates in all fifty states, the Washington Supreme Court's decision resolves a linguistic quirk of Washington law. The Washington Supreme Court did not need to express geographic limits on the decision because the WLAD is a Washington statute. Despite the Grand Aerie's dramatic suggestions, the Washington Supreme Court has no ability to compel local aeries in other states to admit women. Petitioner's allegations of a national danger are baseless.

Likewise, Petitioner's claim that numerous other Washington organizations will be required to admit women is meritless. There is no evidence that any other organizations have the same non-private nature and vacillating admissions policies demonstrated in this case. The particular facts of this case were key to the Washington Supreme Court's ruling that the Grand Aerie did not have an expressive interest that outweighed Washington State's compelling interest in preventing discrimination. *Eagles*, 148 Wash. 2d at 253-54. The Washington Supreme Court's ruling may apply to other organizations that have characteristics similar to those of the Eagles, in which case the organizations in question may fall outside the exception to the state anti-discrimination law. The Washington Court's decision in no way conflicts with the holding in *Dale* because *Dale* concerned a private organization. The Boy Scouts and Girl Scouts, contrary to Petitioner's claims, are not affected by this decision.

Petitioner's claim that this decision will in some way eliminate the statutory exemption for "distinctly private" clubs is vague and speculative at best. Petitioner implies that it is impossible for a private club to exist under the Washington ruling. *See* Petition at 24. Yet, private clubs are indeed capable of existing within the *Roberts* factors.

See, e.g., Louisiana Deb. And Lit. Ass'n v. City of New Orleans, 42 F.3d 1483 (5th Cir. 1995) (finding club private on basis of extremely restrictive and limited admission process). The Washington Supreme Court's decision is fully consistent with federal rights.

VI. CONCLUSION

As an organization operating in Washington State, the Eagles must comply with Washington law. The Washington Supreme Court correctly recognized that it is not private, and therefore is not exempt from Washington's laws against discrimination. The Grand Aerie's expressive rights, as the organization has established them, are not affected by the decision because women are already Eagles members and an integral part of the organization. The Grand Aerie provides no logical basis for its claim that the Eagles' associational rights require that only men participate in member rituals where the Eagles currently continue to fully involve its female members. The Washington Supreme Court's ruling does not impair a federal

right or conflict with other decisions. Petitioner raises no issue justifying the grant of a writ of certiorari.

Respectfully submitted,

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Washington State Equal Rights Amendment

Wash. Const., Art. XXXI

§ 1. Equality not denied because of sex

Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

Washington Law Against Discrimination

Wash. Rev. Code § 49.60.030. Freedom from discrimination – Declaration of civil rights

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil right. This right shall include, but not be limited to:

. . .

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

Wash. Rev. Code § 49.60.040. Definitions

. . .

(10) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether

conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;

Honorable Richard A. Strophy
Noted for Hearing: 1/14/00

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNOR; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE M. RILEY; DIANE E. ROBERTS; JANET TRESENRITER; ALICE F. VASSAR, and WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, v. GRAND AERIE, FRATERNAL ORDER OF EAGLES and WASHINGTON STATE AERIE, FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	NO. 99-2-01214-1 DECLARATION OF ALTON F. BRASHER IN SUPPORT OF SUMMARY JUDGMENT (Filed Dec. 07, 1999)

I, Alton F. Brasher, declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

1. I am the Past Worthy President of Tenino Aerie 564 of the Fraternal Order of Eagles ("Aerie 564"). I served as Worthy President from June 1998 to June 1999. I make this declaration based on my own knowledge and I

am competent to the matters contained in this declaration.

2. I joined Aerie 564 in 1965. I held a number of leadership positions between 1994 until I was expelled from the Eagles earlier this year for my continued support of including women as Eagles. I am appealing that expulsion, which was against the Eagles Constitution, By-Laws and Statutes.

3. Aerie 564 is an active, thriving Aerie. It owns and operates a large facility in downtown Tenino which includes a bar, a dance floor, and space for meetings and activities. In recent years Aerie 564 has sponsored numerous functions including community parades, pancake breakfasts, holiday events for children and families, karaoke nights, beer gardens and weekly suppers. The community attends many of these functions, along with Eagles and Eagles Auxiliary members and their guests. Aerie 564 also has engaged in many service activities, including fund raising for a variety of charitable causes. In addition, Aerie 564 sponsors various activities such as sports teams.

4. The task of running such an active organization has always included many women. In fact, women have participated side by side with men in virtually every activity of Aerie 564. The only functions in which women did not participate prior to 1996 were the bi-monthly membership meetings.

5. I am a member of Aerie 564's Nominating Committee. In Aerie 564 existing members nominate people they know through family, work, church, social activities, shared hobbies, or other connections. A person is "nominated" once they have completed a

rudimentary application form and paid a $15.00 initiation fee and the first years' annual dues. Exhibit 1. The nominee is then told to attend a specific Aerie meeting, generally within one month of completing the application.

6. Prior to the start of the meeting the candidate is interviewed by the Interviewing Committee. The interview lasts from 10 to 15 minutes. There are no required questions, but nominees are often asked what prompted their interest in the organization. The Interviewing Committee asks some questions to determine "moral fitness," for example, whether applicants have a criminal history and whether they are a member of the communist party, the KKK or other extremist groups. Nominees are also asked about their personal, family and work background. Some of the rules of the Aerie are explained and they receive information about the Eagles. Finally, nominees are asked about their interests and encouraged to get involved once they become members.

7. The nominee is then presented at a full membership meeting for acceptance or rejection. In the past, a candidate could be rejected if three of those who attended the meeting voted against their membership. In 1996, the Grand Aerie amended the rules, and now a candidate is admitted unless a majority of those present vote against admittance.

8. Aerie 564 has faced criticism for admitting women. On May 12, 1996, when Aerie 564 initiated a father and daughter, William Blum, who was then the Grand Worthy Vice President and President-Elect (and a member of the Chehalis Aerie No. 1550, stated that

the admission of women was "a disgrace to the rituals of the Order and no laughing matter."

9. By letter dated January 3, 1999, the Secretary of the State Aerie informed Local Aeries that women could no longer be Eagles.

10. On March 1, 1999, the Grand Secretary sent all Local Aeries a letter reminding them that Section 70.2 requires applicants to be male. This was the first time Aerie 564 received anything from the Grand Aerie that suggested that the applications of women would no longer be accepted.

11. On March 1, Chuck Tarver, Dave Roberts and I were brought up on fraternal charges and expelled for sponsoring women.

1417 HAYES AVE. N.W.
Olympia, Wa. 98502 12-7-99 Alton F. Brasher
Date & Place Alton F. Brasher

Honorable Richard A. Strophy
Noted for Hearing: 1/14/00

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564; KATHLEEN L. CONNOR; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE M. RILEY; DIANE E. ROBERTS; JANET TRESENRITER; ALICE F. VASSAR, and WHIDBEY ISLAND AERIE NO. 3418, Plaintiffs, v. GRAND AERIE, FRATERNAL ORDER OF EAGLES and WASHINGTON STATE AERIE, FRATERNAL ORDER OF EAGLES, WASHINGTON STATE AERIE, Defendants.	NO. 99-2-01214-1 DECLARATION OF CHARLES N. TARVER IN SUPPORT OF SUMMARY JUDGMENT (Filed Dec. 07, 1999)

I, Charles N. Tarver, declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

1. I make this declaration based on my own knowledge and I am competent to the matters contained in this declaration.

2. I joined Fraternal Order of Eagles, Tenino Aerie No. 564 ("Aerie 564") in July 1994. At that time Aerie 564 was near financial collapse due to mismanagement and extremely high overhead. I agree [sic] to try to help it turn around as long as I had the support of the Trustees and members, which was given to me. When I joined I had no previous experience with the Eagles but I immediately recognized what an asset they were to humanity, and I became dedicated to heir [sic] cause of trying to help other people. All my life has been one of helping others, so this opportunity suited me quite well.

3. I was appointed Secretary in March 1995. I received approximately $650.00 per month for my work. I remained Secretary until May 15, 1999, when I was removed against my will because I continued to submit the names of women as members.

4. Established in Seattle in 1989, [sic] the Fraternal Order of Eagles has spread across the United States and internationally and now claims in excess of 1.6 million members. The international governing body is the Grand Aerie of the Fraternal Order of Eagles ("Grand Aerie") which has adopted a Constitution, Bylaws and Statutes. Exhibit 1. Local Aeries agree to adopt the Constitution established by the Grand Aerie, and to follow the rules and regulations it establishes. The Grand Aerie alone has the power to grant and revoke Aerie charters.

5. People join chapters, called "Local Aeries," that typically own their own facilities including a cocktail area, kitchen facilities and meeting or activity space. Each Aerie is led by a Board of Officers and Trustees that includes the following positions: Worthy President;

Jr. Worthy President; Vice President; Chaplain; Secretary; Treasurer; Aerie Auditor; Inside Guard; Outside Guard and Trustees. Aside from the Secretary, all the Officers and Trustees volunteer their time.

6. Local Aeries are grouped into Districts within a State, and each State has its own State Aerie. State Aeries do not have independent control over Local Aerie. Instead, District and State meetings serve as forums for sharing news and information, and for discussing policy issues in advance of the organizations annual convention.

7. As Secretary I received a variety of booklets and documents from the Grand Aerie. Exhibit 2 is a the [sic] new member welcome brochure. We get copies of this brochure from the National Aerie to distribute to new and potential members.

8. Aerie 564 was established in 1904. As of June of 1999, it had an active membership of 721 including 56 women.

9. Local Aeries decide whether a candidate satisfies the requirement for membership in the Eagles. Once it initiates a new member his or her name is forwarded to the Grand Aerie, along with a portion of the member's $16.00 initiation fee. The Grand Aerie then assigns the new member a Grand Aerie number.

10. Aerie 564 has submitted to the Grand Aerie the names of all those it has admitted as members, along with all monies due. Those women who Aerie 564 admitted prior to March 1, 1999 have received Grand Aerie numbers. With the exception of one woman who had a gender-neutral name, those women who Aerie 564

admitted after March 1, 1999 have not received Grand Aerie numbers, but their initiation fees have not been refunded.

11. The Eagles have always placed a premium on increasing membership. The Grand Aerie has created a Membership Department that helps Local Aeries increase their membership. The State Aerie has a Membership Chair with similar responsibilities. The Membership Department assigns Local Aeries quotas for increasing membership. It sends monthly letters to Local Aeries commending them for meeting their quotas or remonstrating them if they have failed. It coordinates membership campaigns and provides various types of member services. In addition, it awards special honors and commendation to Aeries who greatly exceed their goals, and it gives awards to members who are instrumental in recruiting many new members.

12. In 1997-98, Aerie 564 was expected to increase membership by seven per month. Aerie 564's success in initiating 96 new members in 1998 earned it the Centennial Award. In 1998-99 Aerie 564 was expected to increase its membership by 5 per month. It exceeded that by two and a half times. Aerie 564 regularly receives letters like Exhibit 3, commending us for achieving our membership goals. Recently the Grand Aerie awarded a commemorative jacket to a member of Aerie 564, Dave Roberts, for his success in brining [sic] in many new members during the previous year.

13. The Grand Aerie distributes an "Aerie Officers' Handbook. Exhibit 4. It recommends that Local Aeries adopt Interviewing Committees to review applications for membership, but otherwise Local Aeries are free to

establish their own specific procedures for selecting new members. Aerie 564 has added 450 members in the past five years. During that time, only two people who were nominated for membership were rejected.

14. Like many organizations, in its early years the Eagles enforced a variety of discriminatory membership practices. By the late 1980's all the discriminatory requirements had been removed except the prohibition against women members. In the 1980s and early 1990s an effort began to expand the membership of the Eagles to include women.

15. In 1995 Aerie 564 learned that the Grand Tribunal had reviewed the Eagle's constitutional limitation on the admission of women as members and had issued Opinion 750 which permitted Local Aeries to admit women.

16. Aerie 564 quickly acted to admit women after it learned of Opinion 750, as did several other Washington Aeries, including Olympia, Gig Harbor, Whidbey Island and Spokane Valley, among others.

17. The increase in membership that resulted once Aerie 564 started to admit women has substantially increased revenue for Aerie 564, and, for the Grand Aerie, which receives a portion of those dues in an annual tax that must be paid on behalf of each member. In addition, the increase in the number of people socializing at the Aerie on weekends has poured money into Aerie 564's coffers. The extra money has been critical to the Aerie. In 1995 the Aerie was close to bankruptcy for a number of reasons. A number of us have worked hard over the past few years and the finances are now in excellent shape. One of the biggest factors helping us to

stabilize the Aerie's finances has been the admission of women as members because of the increased dues and the increased revenues from the re-energized Aerie.

18. Not all members were happy with the Grand Tribunal's decision to follow the law and permit Local Aeries to admit women. Since soon after it began admitting women, Aerie 564 has faced criticism for its actions. However, between 1996 and March of 1999 the Grand Aerie continued to accept the female members submitted by Aerie 564, and each year it collected the annual tax on behalf of these members.

19. Earlier in 1999, I was brought up on "fraternal charges" for continuing to forward the names of female members to the Grand Aerie and I have been expelled. I am appealing that expulsion because I believe it was against the Constitution, By-Laws and Statutes of the Eagles.

20. Women and members of the community are often involved in Aerie activities. Women who are Auxiliary members or guests a [sic] Local Aerie or Auxiliary member can take advantage of the club's social room. Women can be employed by the Eagles as club managers or staff. In addition, the community is invited to many of the Eagles functions, which include parades, holiday parties, civic celebrations, benefit dinners swing dancing and karaoke.

Dec. 7, 1999
Olympia WA 98506
Date & Place

Charles N. Tarver
Charles N. Tarver

Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

(3)

No. 02-1415

IN THE
Supreme Court of the United States

GRAND AERIE, FRATERNAL ORDER OF EAGLES,
Petitioner,

v.

TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES; KETHLEEN J. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENRITER; ALICE F. VASSAR; AND WHIDBEY ISLAND AERIE NO. 3418, FRATERNAL ORDER OF EAGLES,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Washington

BRIEF *AMICI CURIAE* OF CONFERENCE OF PRIVATE ORGANIZATIONS; GRAND LODGE OF FREE AND ACCEPTED MASONS OF WASHINGTON; AND PRINCE HALL GRAND LODGE OF FREE AND ACCEPTED MASONS, STATE OF WASHINGTON AND JURISDICTION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI*

Amici represent some of the largest fraternal organizations in the Nation.

The Conference of Private Organizations ("CONPOR") is a coalition of not-for-profit organizations established to support and defend the rights of religious, fraternal, and sororal groups that promote charitable, educational, and philanthropic activities.[1] Its constituents include the Loyal Order of Moose, the Women of the Moose, the Benevolent and Protective Order of Elks, and the Women's Auxiliary of the Elks – organizations that comprise almost three million members. CONPOR seeks to ensure its members' privacy and associational rights, both locally and nationally, and to promote the utility of such private membership organizations in a global marketplace of ideas. It participated as *amicus* in this case in the Washington Supreme Court and in the Washington Court of Appeals.

The Grand Lodge of Free and Accepted Masons of Washington is the Washington branch of the national fraternal organization commonly known as the Masons. (The Masons does not have a centralized, national office.) The Masonic Fraternity is the oldest fraternity in the world. There are some 1.8 million Masons nationwide, and approximately 21,000 members of the Washington branch. Membership in the Masons also qualifies individuals for membership in other fraternal organizations, such as the Shrine of North American (a.k.a. the Shriners), the Scottish Rite, and the York Rite. Since their inception centuries ago, the Masons always have been an all-male organization.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored any part of this brief, and no person or entity, other than *Amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

The Prince Hall Grand Lodge of Free and Accepted Masons of the State of Washington and Jurisdiction is a branch of the national fraternal organization of Masons of African American descent. Its membership of approximately 2200 individuals covers Washington and several foreign countries. The Prince Hall Masons were founded in Boston in 1775, and the Washington and Jurisdiction branch was established in 1904. Like the Masons, the Prince Hall Masons is founded upon principles established in the Holy Bible and engages in community service. Its past members include Justice Thurgood Marshall, W.E.B. DuBois, and Booker T. Washington. It always has been an all-male organization.

SUMMARY OF ARGUMENT

1. The Washington Supreme Court's novel application of that State's public accommodations law to force a single-sex social fraternal organization to accept members of the opposite sex stretches this Court's First Amendment precedent beyond its breaking point. Although this Court has held that states may apply public accommodations laws to require *commercial* organizations such as the United States Jaycees and the Rotary Club to accept members whom they do not desire, this Court has never extended that jurisprudence to purely social or benevolent orders. To the contrary, several Justices of this Court have indicated that public accommodations laws may *not* trump private organizations' First Amendment right to expressive association when membership in those organizations does not provide any commercial or economic benefits.

This case places this commercial-noncommercial distinction in stark relief. The Fraternal Order of the Eagles is a social fraternal association that seeks to instill a quasi-religious system of values in its members and has a rich history of charitable service and public advocacy for workers' rights causes. Pet. App. 93-94. In contrast to the Jaycees and the

Rotary Club, membership in the Eagles does not serve any commercial purpose. As the Washington courts acknowledged, it is undisputed that the Eagles "prohibits promotion of business or economic interests by its members." Pet. App. 3. "No outside business may be conducted at [local Eagles] meetings, and [the Eagles] does not offer training or opportunities for its members to develop business skills or contacts." Pet. App. 68.

Allowing a state to force organizations such as the Eagles to accept members against their wishes would destroy the fundamental boundary separating equal economic opportunity from the right to free expression. States have a compelling interest in ensuring that commercial and socioeconomic opportunities are available on a nondiscriminatory basis. But they do *not* have any legitimate interest in meddling with the messages that noncommercial groups, such as fraternal organizations and benevolent orders, convey to their members and to society – no matter how objectionable states may deem those messages to be.

2. This Court should not put off its consideration of this important issue. The permissibility of requiring social fraternal organizations to accept members whom they do not desire affects not only the Eagles, but also the vitality of national organizations such as the Loyal Order of Moose, the Masons, and the Shriners – all of which also are single-sex associations that advance social and benevolent causes but do not offer their members any commercial benefits. It is critical that these organizations maintain consistent membership criteria. The Washington Supreme Court's decision, however, places these organizations under conflicting legal regimes: it prohibits the enforcement of membership policies in Washington that are perfectly lawful in other states.

There is no reason to await further percolation of the First Amendment issue presented. No precise split of authority

will develop on this issue. Courts that have refused to require fraternal and social groups such as the Eagles to accept women as members have not reached the groups' First Amendment defense, ruling instead on statutory grounds that their states' state public accommodations laws do not reach such organizations. Future courts rejecting such lawsuits are sure to do the same. Thus, even if any other court someday reaches the First Amendment issue presented here, it will resolve the issue the same way as the Washington Supreme Court did.

REASONS FOR GRANTING THE WRIT

I. The Washington Supreme Court's Decision Stretches the First Amendment's Tolerance of Public Accommodations Laws Beyond Its Breaking Point.

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). This Court, therefore, has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). Because it is patent that the composition of expressive organizations affects their abilities to pursue such ends, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Id.* at 623.

When the terms of a state public accommodations law require an expressive organization to accept members with whom it does not wish to associate, the First Amendment permits the law to be applied only if it is "justified by . . . [a] compelling state interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts,* 468 U.S. at

623; *accord Boy Scouts of America v. Dale,* 530 U.S. 640, 658 (2000); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987). The central issue this case presents is whether a State's general interest in eliminating societal discrimination allows it to force a purely noncommercial and expressive organization to accept members it does not desire. The Washington Supreme Court in this case became the first court ever to allow such a general state interest to trump a social fraternal organization's freedom of association.

A. This Court's Decisions Upholding Applications of Public Accommodations Laws to Expressive Organizations Have Involved Exclusively *Commercial* Organizations.

This Court's decisions consistently have distinguished between the First Amendment rights of commercial and social fraternal organizations to determine their membership criteria. In *Roberts v. United States Jaycees,* this Court allowed Minnesota to compel the Jaycees to accept female members because the club offered to members "various commercial programs and benefits," such as training in business solicitation and management techniques. 468 U.S. at 626 (internal quotation omitted). In doing so, this Court adopted the Minnesota Supreme Court's determination that states have a compelling interest in assuring equal access to "[l]eadership skills . . . , business contacts and employment promotions." *Id.* (quotation omitted). Justice O'Connor, in a concurring opinion, underscored the importance of the commercial aspect of the Jaycees, stating that there is a "dichotomy between rights of commercial association and rights of expressive association." *Id.* at 634. The First Amendment allows a state to require the Jaycees to accept women as members, she wrote, because the Jaycees' membership activities are "commercial [in] nature," *id.* at 639, and the state's goal of "ensuring nondiscriminatory access to commercial opportunities" is "profoundly important." *Id.* at 632.

Both of this Court's decisions following *Roberts* that have allowed states to force expressive organizations to accept unwanted members have done so only after carefully noting that membership in the organizations afforded commercial opportunities. In *Rotary,* the other principal case upon which the Washington Supreme Court relied here, Pet. App. 32, this Court explained that state public accommodations laws serve the "compelling interest in assuring equal access to . . . the acquisition of leadership skills and business contacts as well as tangible goods and services." 481 U.S. at 549. This Court required the Rotary Club to accept women as members because the Club afforded its members "business advantages," and because "business benefits" and "business concerns are a motivating factor in joining local [Rotary] clubs." *Id.* at 543 (internal quotations omitted).

In *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988), this Court upheld New York City's law prohibiting certain expressive organizations, but not others, from employing discriminatory membership criteria, in part because the law required only "[p]redominantly commercial organizations" to accept undesired members. *Id.* at 20 (O'Connor, J. concurring). Based on the sensibility of this limitation, this Court rejected an equal protection challenge to the exemption in the law for fraternal organizations and "benevolent orders" and religious organizations.

B. Several Justices of This Court Have Indicated That Public Accommodations Laws May Not Be Applied to Membership Policies of Fraternal Organizations.

In contrast to the Jaycees and the Rotary Club, membership in the Eagles does not serve any commercial or socioeconomic purpose. As the Washington Supreme Court acknowledged, it is undisputed that the Eagles "advances only social and charitable causes and that it prohibits promotion of

business or economic interests by its members." Pet. App. 3. In addition, "no outside business may be conducted at [local Eagles] meetings, and [the Eagles] does not offer training or opportunities for its members to develop business skills or contacts." Pet. App. 68; *see also* Pet. App. 98 (trial court opinion distinguishing Eagles from Rotary Club on this basis). The question here thus becomes whether a state can have a compelling interest in eliminating discrimination in a noncommercial, social organization such as the Eagles.

Everything this Court has written on the subject suggests that the answer is no. Over one hundred years ago, the first Justice Harlan, dissenting in *The Civil Rights Cases*, 109 U.S. 3 (1883), explained that "[n]o government ever has brought, or ever can bring, its people into *social* intercourse against their wishes. Whether one person will permit or maintain *social* relations with another is a matter with which the government has no concern." *Id.* at 59 (emphasis added). So well accepted was this limitation on governmental power that when this Court eventually confronted a case involving a local lodge of the Loyal Order of Moose, which this Court correctly described as "a national fraternal organization," this Court noted that the appellee challenging the lodge's guest service regulations "conced[ed] the right of private clubs to choose members upon a discriminatory basis." *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 171 (1972); *see also id.* at 179 (Douglas, J., dissenting) (agreeing that "the First Amendment . . . create[s] a zone of privacy which precludes government from interfering with private clubs or groups" and that "[t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed").

Justice O'Connor elucidated the basis of this right to social association, and distinguished it from "commercial association" in *Roberts*. She explained that "this Court's case law recognizes radically different constitutional protections" for social and commercial associations. 468 U.S. at 638

(O'Connor, J., concurring). "The First Amendment is offended by direct state control of the membership of an organization engaged exclusively in protected expressive activity, but no First Amendment interest stands in the way of" such control over "commercial association." *Id.*

The Court echoed this principle in the *New York State Club* case, upholding New York City's decision to exempt "benevolent orders" and religious organizations from its public accommodations law because such groups "are different in kind" from other groups, "at least in the crucial respect of whether business activity is prevalent among them." 487 U.S. at 18. Although Justice Scalia, like the rest of the Justices, joined the Court's opinion the previous year requiring the Rotary Club to accept women as members, he explained here that groups in which "business activity is [not] prevalent" do "not significantly contribute to the problem" of equal commercial opportunity that public accommodation laws address. *New York,* 487 U.S. at 21 (Scalia, J., concurring).

To be sure, public accommodations laws may – and Washington's does – require noncommercial organizations, when they choose to open their doors to non-members, to do so on an equal opportunity basis. *See* Wash. Rev. Code § 49.60.040(10). When organizations such as the Eagles host public banquets or simply rent their facilities to others, they must make those goods and services available to women and all other groups protected by a public accommodations law. *See Roberts,* 468 U.S. at 636 (O'Connor, J., concurring) (when private organization "enters marketplace of commerce," States may regulate that activity); *Moose Lodge,* 407 U.S. at 180 (Douglas, J. dissenting) (same); *Watson v. Fraternal Order of the Eagles,* 915 F.2d 235, 243-44 (6th Cir. 1990) (requiring Eagles to serve all patrons at a public social event).

But when, as here, an organization demonstrates that it does not cultivate its members' business skills or commercial

opportunities, no decision from this Court or any other court until now has ever construed a public accommodations law to require the group *to accept new members* against its wishes. *See Louisiana Debating & Literary Ass'n v. City of New Orleans,* 42 F.3d 1483, 1494-97 & n.18 (5th Cir. 1995) (government lacks a legitimate interest in controlling membership policies of "purely social" clubs that "prohibit the transaction or discussion of any business on their premises"); *Kiwanis Int'l v. Ridgewood Kiwanis Club,* 806 F.2d 468 (3d Cir. 1986) (New Jersey law does not require Kiwanis to admit women as members); *Benevolent & Protective Order of Elks,* 863 F. Supp. 529, 532-34 & n.2 (W.D. Mich. 1994) (although Michigan public accommodations law requires clubs with "purely social, nonbusiness purpose" to make "facilities" available on equal basis, it does not reach such clubs' "membership" policies); *Solomon v. Miami Woman's Club,* 359 F. Supp. 41 (S.D. Fla. 1973) (federal law does not apply to 32,000-member social club); *Human Rights Comm'n v. Le Club Calumet,* 609 A.2d 285, 287 (Me. 1992) (state law did not reach organization's membership policies because "plaintiffs offered no evidence that club membership is essential to maintenance of social or business opportunities in the . . . community"); *Human Rights Comm'n v. Loyal Order of Moose,* 294 A.2d 594 (Pa. 1972) (although law requires lodge to serve public on an equal basis when it opens its dining room to the public, that law does not affect "activity [that] is related to membership in the organization"). The Washington Supreme Court's decision here is the first opinion to hold otherwise.

C. The Washington Supreme Court's Focus on the Selectivity of Fraternal Organizations' Membership Practices Misapprehends This Court's Expressive Association Precedent.

While acknowledging that the Eagles "support and undertake social causes and projects," not commercial ones, the

Washington Supreme Court nevertheless rejected the Eagles' First Amendment defense on the ground that the organization actively recruits new members and is "not selective in its membership practices." Pet. App. 35.[2] Regardless of whether this characterization of the Eagles' membership practices is accurate, it totally misapprehends this Court's expressive association jurisprudence.

This Court's recent decisions in *Boy Scouts* and *Hurley v. Irish-Amer. Gay, Lesbian & Bisexual Group,* 515 U.S. 557 (1995), make it clear that an organization's First Amendment right to engage in expressive association does not depend in any way on its size or selectivity.

In *Boy Scouts*, despite the fact that the Boy Scouts is a "nonselectiv[e], inclusive rather that exclusive" organization, 530 U.S. at 646, whose "aggressive recruit[ing]" policy has generated over five million members, *Dale v. Boy Scouts of America,* 734 A.2d 1196, 1200-01 (N.J. 1999), this Court held that the Scouts had a First Amendment right to resist accepting gay members. In *Hurley*, this Court likewise held that Massachusetts' public accommodations law violated the First Amendment to the extent that it required a "noncommercial" Irish parade organization, *id.* at 579, to include gay persons in its annual parade. Despite the fact that the parade organizers used a "lack of genuine selectivity in choosing participants and sponsors," *id.* at 562 (quoting lower court), this Court explained that the unwanted persons' inclusion in the parade

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[2] The Washington Supreme Court also stated that "[t]he record reveals facts suggesting that the Eagles' membership practices are selective." Pet App. 36. While this circumstance might have suggested that summary judgment was inappropriate here, the Court nevertheless concluded that "[o]n the entire record before us, we conclude that the conclusions reached by the trial court on the summary judgment motions" – including that "the Eagles was not selective in its membership practices," Pet. App. 35 – "were not in error." Pet. App. 37.

> would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.

Id. at 574. The First Amendment, this Court concluded, entitled the parade organization to decline to send that message. *Id.* at 579.

Despite extensive briefing on this subject,[3] the Washington Supreme Court never explained how its decision here could be reconciled with these precedents. The Eagles is a large, noncommercial organization whose membership policy exalts the virtues of brotherhood – or, as Respondents' *Amici* put it in the Washington Supreme Court, "sends the message that discrimination is still acceptable in society." Br. of Women's Law Project et al. at 7. Either way, the Eagles is unquestionably a noncommercial organization engaged in expressive association. But rather than confronting the special problems attendant to squelching such an organization's expression, the Washington Supreme Court majority and concurrence simply stated that the State's interest in deterring and eliminating discrimination permitted it to require the Eagles to accept women as members. *See* Pet. App. 36-37 & 46.

This overarching statement will not do. This Court in *Hurley* expressly rejected the argument that Massachusetts could require the Irish organization to accept gay members because it would serve "forbid[] acts of discrimination toward

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[3] The Eagles briefed the First Amendment issue, relying heavily on the *Boy Scouts* case, in its opening and supplemental briefs in the Washington Supreme Court. *See* Pt. App. 197-200 (supplemental brief). CONPOR submitted a 20-page *amicus* brief dealing exclusively with the First Amendment issue.

certain classes" and "to produce a society free of the corresponding biases." Such a claim, this Court held, "amounts to nothing less than a proposal to limit speech" of noncommercial groups "in the service of orthodox expression." *Id.* at 578-79.

It is an unavoidable reality that "[a] group's membership policy is itself a means of communicating its values, both internally and externally." Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach,* 85 Minn. L. Rev. 1515, 1550 (2001) (describing and defending the commercial vs. noncommercial dichotomy in right-to-associate jurisprudence). Accordingly, the simple lesson of *Hurley* and *Boy Scouts* is that when the presence of an identifiable person or a discrete class of people will communicate a message that is contrary to a *noncommercial* association's beliefs – as the presence of women would regarding an organization with an all-male membership policy – the First Amendment prohibits a state from applying its public accommodations law to compel that group to accept the unwanted person or class of people. This principle applies with full force here and requires reversal of the Washington Supreme Court's decision.

II. The Washington Supreme Court's Decision Threatens the Vitality of Several National Fraternal Organizations.

A. Many National Fraternal Organizations That Have Rich Histories of Public Service and Advocacy Have Always Had Single-Sex Membership Policies.

Fraternal and other social expressive organizations have rich histories in this Nation of fostering social debate and progress. In his famous exposition of the early building blocks of our democracy, Alexis de Tocqueville observed that:

> The right to association [is] almost as inalienable in its nature as the right of personal liberty. . . . In their political associations the Americans, of all conditions, minds, and ages, daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings. They afterwards transfer to civil life the notions they have acquired and make them subservient to a thousand purposes. Thus it is by the enjoyment of a dangerous freedom that the Americans learn the act of rendering the dangers of freedom less formidable.

2 Alexis de Tocqueville, Democracy in America 129, 203 (Bradley ed. 1954).

A recent study by a Harvard sociology professor confirms that social associations remain vital to the health of our democracy and has expresses concern over their decreasing presence in civic life. *See* Robert Putnam, Bowling Alone: The Collapse and Revival of American Community (2000). Professor Putnam explains:

> Social networks are the quintessential resource of movement organizers. Reading groups became sinews of the suffrage movement. Friendship networks, not environmental sympathies, accounted for which Pennsylvanians became involved in a grass-roots protest after the Three Mile Island Nuclear accident. Social ties more than ideals or self-interest explain who was recruited for Freedom Summer, a climactic moment in the civil rights movement. Local church connections account for the solidarity that underlies the Christian Coalition. Precisely because social capital is essential for social

> movements, its erosion could shroud their prospects for the future.

Id. at 152-53 (paperback ed.); *see also* John McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery,* 90 Cal. L. Rev. 485, 529 & n.218 (2002) (describing social progress stimulated by social organizations).

Many fraternal and social organizations that have always had single-sex membership policies now have millions of members and a nationwide presence. The Eagles, by uniting men of common beliefs and goals, has successfully lobbied for the workman's compensation laws, mothers' pensions, old age pensions and social security laws. *See People Helping People: The History of the Eagles* (2001) <http://www.foe.com/history/history.html>. When Franklin Roosevelt signed the Social Security Act in 1935, he gave the pen he used to the Eagles and remarked, "May its possession inspire your members to rededicate their efforts and those of the fraternity to the insuring of such economic and political conditions as will bring a greater degree of happiness to our people." Pet. App. 94.

Several other fraternal and social organizations have similar histories of private inculcation of values and public advocacy. The Loyal Order of Moose and the Women of the Moose, separate fraternal organizations of over 1.5 million members dispersed in hundreds of chapters throughout the United States, hold social and recreational gatherings at members-only lodges and advocate for various children's causes, as well as for better treatment of the disabled and those with serious illnesses. *See Moose: The Family Fraternity* <http://www.mooseintl.org>. The Masons support and celebrate the architecture of major public and religious structures through ceremonies whose roots are centuries old. They also engage in charitable activities in support of health-related and

educational causes. *See Our Vision* <http://www.freemason-wa.org>. The Prince Hall Masons engages in similar practices and emphasizes teaching its members the duties they owe to God. *See Mission Statement* <http://www.mwphglwa.org>.[4]

The Washington Supreme Court's decision here threatens the fundamental structure and vitality of each of these fraternal and social organizations. None of these organizations offer their members commercial or socioeconomic benefits, but they all quite properly draw their strength from large numbers of members who are united by common senses of purpose. People join in part because they desire to be part of a social brotherhood or sisterhood. Even if some of these members' and these organizations' other objectives are not specifically gender-oriented, it is inescapable that forcibly altering the nature of the social ties that these organizations offer would affect their abilities to pursue all of their public service or advocacy goals.

B. Immediate Guidance From This Court Is Essential Regarding the Permissibility of Fraternal and Social Organizations' Gender-Based Membership Criteria.

This Court should consider the issue that this case presents now, rather than waiting for any future case that might

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[4] *Amici* by no means represent all of the social and fraternal organizations that may be subject to the decision up for review here. The Shriners, for example, are a national fraternity of approximately 525,000 men who support a network of hospitals that give free medical care to children. They also hold colorful parades and circuses in their communities. *See The Shrine of North America* <http://www.shrinersshq.org/shrine/welcome.html>. The Knights of Columbus, a fraternal organization of over 1.6 million members, supports the Catholic Church as well as various pro-life and charitable causes. *See The Strong Right Arm of the Catholic Church* <http://www.kofc.org/knights/knights.cfm>. Other such organizations abound.

arise. It is vital that large fraternal and social organizations maintain consistent membership policies. Each chapter, lodge, or aerie is a subpart of a larger association and a larger voice, which is necessarily shaped by the association's overall composition. Furthermore, the bylaws of most fraternal organizations grant each member certain visitation rights in other state's chapters. The Washington Supreme Court's decision, however, subjects these large fraternal organizations' policies to different limitations in Washington than in other states, thereby creating the potential for immediate friction and discord if this Court permits this decision to stand.

Finally, there is no reason to await further percolation of the First Amendment issue this case presents. No precise split of authority will develop on this issue. Courts that have refused to require fraternal and social groups such as the Eagles to accept women as members have not reached the First Amendment issue, ruling instead that their states' state public accommodations laws do not reach such organizations. *See supra* at 9-10 (collecting such decisions) & Pet. App. 77 (court of appeals decision below). Future courts rejecting such lawsuits are sure to do the same. Thus, if any future court reaches the First Amendment issue presented here, it will resolve the issue the same way as the Washington Supreme Court did.

The writings of some of this Court's Justices indicate that they already have thought about the expressive associational rights of noncommercial organizations. There is no reason to believe that this Court is not fully capable of resolving this issue right now. It should do so.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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April 24, 2003

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No. 02-1415

MAY 6

In The

Supreme Court of the United States

GRAND AERIE, FRATERNAL ORDER OF EAGLES,

Petitioner,

v.

TENINO AERIE NO. 564, FRATERNAL ORDER OF EAGLES; KATHLEEN J. CONNER; LANETTE DAVIS; JULIA A. FOSTER; GAYLE L. HARTMAN; KAYCEE L. JOHNSON; ANNETTE RILEY; DIANNE E. ROBERTS; JANET TRESENTRITER; ALICE F. VASSAR; and WHIDBEY ISLAND AERIE NO. 3418, FRATERNAL ORDER OF EAGLES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

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INTRODUCTION

Both Respondents' Brief in Opposition to Petition for Certiorari and the Washington Supreme Court opinion in this case incorrectly apply standards relating to "intimate association." The Eagles are not claiming "intimate association." The Eagles' claim is that application of the Washington Law against Discrimination to Eagles' membership decisions interferes with the Eagles' rights to expressive association. On that claim, Respondents, like the Washington Supreme Court, cite no principled distinction between the present case and this Court's expressive association jurisprudence, including the Court's recent decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).

Respondents do not dispute that this case presents an issue that affects millions of members of social fraternities like the Eagles, the Moose, and the Masons. As both the Petition for Certiorari and the Brief of Amici Curiae filed in support of the Petition make clear, this case affects millions of Americans who value group fellowship with members of the same gender. The federal constitutional issue presented by this nationally important case is exactly the kind of issue this Court should resolve by writ of certiorari.

DISCUSSION

I. Both the Brief in Opposition and the Washington Supreme Court Opinion Incorrectly Apply "Intimate Association" Rules to an "Expressive Association" Case.

In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984), this Court considered claims of both "intimate" and "expressive" association rights. The factors set forth by both the Washington Supreme Court and the Brief in Opposition – "size, purpose, policies, selectivity, congeniality, and other characteristics pertinent to the particular case" – are the factors set forth in *Roberts* for evaluating a claim of intimate association. 468 U.S. at 620. This Court applied those factors to find that the Jaycees is not the sort of intimate association that merits constitutional protection. *Id.* at 621. The Court then turned to the separate question whether the Jaycees' rights to expressive association were infringed. *Id.* at 622.

The question considered by the U.S. Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 was whether forced inclusion of a homosexual leader violated the "expressive association" rights of the Boy Scouts. There is no discussion of the size or selectivity of the organization because those factors are not relevant to a claim of expressive association.

The Eagles' claim is that forced inclusion of women interferes with the right to engage in expressive association. Accordingly the rules for evaluating "expressive association" claims apply.

II. This Court's Holding in *Boy Scouts of America v. Dale* Precludes the State of Washington from Forcing Inclusion of Women in Eagles Aeries.

In *Dale*, this Court set forth a two part test for evaluating First Amendment expressive association. First, the Court must "determine whether the group engages in expressive association," defined to be "some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648. Second, the Court must determine whether the challenged governmental action "would significantly burden" that expression. *Id.* at 653.

Respondents' Brief in Opposition claims that the *Dale* case is different from this case because the Boy Scouts is a "private" group and the Eagles is a "public" group. The Brief cites this Court's brief description of the Boy Scouts as "a private, not-for-profit organization." *Id.* at 644. In the context of the opinion, the Court is obviously using the term private to mean non-governmental. There is no suggestion in *Dale* that the Boy Scouts is private in the sense that it is a small, intimate, or highly selective group. The *Dale* decision does not even consider these factors because the only question decided is whether New Jersey violated the Boy Scouts' right to engage in expressive association. *Id.* at 644.

The Brief in Opposition also attempts to distinguish the *Dale* case by claiming that inclusion of women is not antithetical to the Eagles' message. Contrary to Respondents' suggestion, the very name "Fraternal Order of Eagles" and numerous other references in the founding documents of the organization make clear that the organization expresses the value of brotherhood and therefore limits aerie membership to males. App. 156-180. The record also demonstrates that the secret rituals of the

Order inculcate and express both "manly virtues" and the value of an all-male brotherhood. App. 116-17.

When the Grand Aerie considered whether to bow to legal pressure and admit women, the group, composed of representatives from aeries all over the country, voted overwhelmingly in favor of a resolution stating that "a Male is a Man, a Female is a Woman, a Man is a Brother, a Woman is a Sister; a Brother belongs to the Aerie, a Sister belongs to the Auxiliary" and declining to substitute the word "person" for the word "man" in Eagles membership criteria. App. 141, 151. The forced inclusion of women would preclude the Eagles from expressing the value of an all-male social brotherhood and an all-female sisterhood because they would no longer be able to hold meetings separated by gender. Separating by gender is the essence of the Eagles' expressive association regarding this issue.

Respondents also claim that the Eagles have lost their right to expressive association because they admitted some women and because the brotherhood message is inconsistent with other statements by the organization. In *Dale*, the Court rejected the same kinds of arguments. Rejecting claims that the Boy Scouts had inconsistently expressed or acted on their beliefs, the Court explained that the fact an organization "does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection." *Id.* at 656.

The State of Washington has no legitimate interest sufficient to outweigh the Eagles' right to free expression. The Washington Supreme Court accepted that "the organization advances only social and charitable activities and that it prohibits promotion of business or economic

interests by its members." Opinion, App. 3. Requiring the Eagles to admit women would serve to eradicate the Eagles' message that there is value in group fellowship among members of the same sex. As this Court explained in *Dale*, "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 661. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* (citing *Hurley v. Irish-Amer. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995)).

CONCLUSION

This Court should resolve this nationally important First Amendment dispute by writ of certiorari to the Washington Supreme Court.

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